Supreme Court, U.S.
FILED

(1)

98 815 NOV 16 1998

No. 98-___ OFFICE OF THE CLERK

---

In The

# Supreme Court of the United States

October Term, 1998

◆

BROWNING-FERRIS INDUSTRIES
OF COLORADO, INC.,

*Petitioner,*

v.

THOMAS H. DECKER,

*Respondent.*

◆

On Petition For A Writ Of Certiorari
To The Colorado Supreme Court

◆

## PETITION FOR A WRIT OF CERTIORARI

◆

McNAMARA LAW FIRM, P.C.

JOHN N. McNAMARA, JR.
Colorado Registration No. 2471
*Counsel of Record*

RICARDO M. BARRERA
Colorado Registration No. 20365
*Special Counsel*

1660 17th Street, Suite 100
Denver, Colorado 80202
Tel: 303.572.1660

*Counsel for Petitioner*

---

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

184 pp

## QUESTIONS PRESENTED

1. Did the Colorado Supreme Court deprive petitioner of its property without due process of law on appeal:

   (a) by converting a claim for breach of the covenant of fair dealing, from tort to contract, thus rendering petitioner's post-trial motions and intermediate appeal worthless, and/or

   (b) by affirming liability solely *ex contractu* when the parties stipulated, and the trial court ruled, that the claim for breach of the covenant of fair dealing was a claim *ex delicto*, and/or

   (c) by accepting, as stated in a subsequent companion opinion, the jury's verdict of lost future wages on the claim for breach of the covenant of fair dealing while conceding that the elements of the contract claim, and the proofs necessary to sustain that claim, were never issues on appeal and thus have never been established by any Colorado court?

2. Did the Colorado Supreme Court deny petitioner equal protection of state common law by affirming contract liability for lost future wages when other employers who make similar covenants of fair dealing are free from such liability when no definite term of future employment is expressed or implied in the employer's covenant of fair dealing to at-will employees?

# LIST OF PARENT COMPANIES AND NON-WHOLLY OWNED SUBSIDIARIES

Petitioner is owned by parent, Browning-Ferris Industries, Inc., a Delaware corporation. Petitioner has no non-wholly owned subsidiaries.

## TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ........................ i

LIST OF PARENT COMPANIES .................... ii

TABLE OF AUTHORITIES ........................ v

CITATIONS TO OPINIONS BELOW ................ 1

JURISDICTION .................................. 1

CONSTITUTIONAL PROVISION INVOLVED ....... 8

STATEMENT OF THE CASE ...................... 9

REASONS FOR GRANTING THE WRIT ........... 22

I. BY CONVERTING RESPONDENT'S CLAIM FOR BREACH OF COVENANT OF FAIR DEALING FROM TORT TO CONTRACT, THE COLORADO SUPREME COURT NULLIFIED PETITIONER'S POST-TRIAL MOTIONS AND INTERMEDIATE APPEAL, THUS DENYING BFI DUE PROCESS OF LAW ................ 23

II. THE COLORADO SUPREME COURT DENIED BFI DUE PROCESS OF LAW BY AFFIRMING DAMAGES SOLELY *EX CONTRACTU* WHEN THE PARTIES STIPULATED, AND THE TRIAL COURT RULED, THAT THE CLAIM FOR BREACH OF COVENANT OF FAIR DEALING WAS LITIGATED *EX DELICTO* .............. 24

III. THE STATE SUPREME COURT DENIED BFI DUE PROCESS OF LAW BY ACCEPTING THE JURY'S VERDICT WHILE PROCLAIMING THAT THE ELEMENTS OF THE NEW CLAIM, AND THE PROOFS NECESSARY TO SUSTAIN THAT CLAIM, WERE NEVER ISSUES ON APPEAL .................................. 26

TABLE OF CONTENTS – Continued

Page

IV. THE COLORADO SUPREME COURT DENIED BFI EQUAL PROTECTION OF STATE LAW BY IMPOSING CONTRACT LIABILITY FOR LOST FUTURE WAGES WHEN OTHER EMPLOYERS WHO MAKE SIMILAR PROMISES OF FAIR DEALING ARE FREE FROM SUCH LIABILITY WHEN NO DEFINITE TERM OF FUTURE EMPLOYMENT IS EXPRESSED OR IMPLIED IN THE EMPLOYER'S PROMISE ................ 29

CONCLUSION .................................. 30

## TABLE OF AUTHORITIES

Page

CASES

*Adams v. Robertson,* 520 U.S. 83, 117 S.Ct. 1028, 137 L.Ed.2d 203 (1997)................................3, 6

*Bankers Life and Casualty Co. v. Crenshaw,* 486 U.S. 71, 108 S.Ct. 1645, 100 L.Ed.2d 62 (1988)........... 2

*Beck v. Washington,* 369 U.S. 541, 82 S.Ct. 955, 8 L.Ed.2d 98 (1962).................................. 29

*Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107 (1930) ....26, 27

*Bushnell v. Crooke Mining & Smelting Co.,* 148 U.S. 682, 13 S.Ct. 771, 37 L.Ed. 610 (1893) .............. 4

*BMW of North America, Inc. v. Gore,* 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996) ............ 28

*Campbell v. Louisiana,* ___ U.S. ___, 118 S.Ct. 1419, 140 L.Ed.2d 551 (1998)............................. 4

*Cole v. Arkansas,* 333 U.S. 196, 68 S.Ct. 514, 92 L.Ed. 644 (1948)........................................... 23

*Colorado River Water Conservation District v. Bar Forty Seven Co.,* 579 P.2d 636 (Colo. 1978).......... 25

*Crocog Co. v. Reeves,* 992 F.2d 267 (10th Cir. 1993) .... 23

*District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983) ..... 5

*Ellis v. Dixon,* 349 U.S. 458, 75 S.Ct. 850, 99 L.Ed. 1231 (1955)........................................... 7

*Evitts v. Lucey,* 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985)..........................26, 27

*Ewy v. Sturtevant,* ___ P.2d ___, 1998 WL 251661 (Colo. App. May 14, 1998)....................... 24

## TABLE OF AUTHORITIES – Continued

Page

*Ex Parte Virginia*, 100 U.S. 339, 25 L.Ed. 676 (1879) .... 22

*Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 53 S.Ct. 145, 77 L.Ed. 360 (1932) .... 5

*Hathorn v. Lovern*, 457 U.S. 255, 102 S.Ct. 2421, 72 L.Ed.2d 824 (1982) .... 7

*Hendricks v. Industrial Claim Appeals Office*, 809 P.2d 1076 (Colo. App. 1990) .... 25

*Honda Motor Co. Ltd. v. Oberg*, 512 U.S. 415, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994) .... 22, 24

*Kiowa Indian Tribe of Oklahoma v. Hoover*, 150 F.3d 1163 (10th Cir. 1998) .... 4

*Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 102 S.Ct. 1883, 72 L.Ed.2d 262 (1982) .... 23

*Lauren Corp. v. Century Geophysical Corp.*, 953 P.2d 200 (Colo. App. 1998) .... 7

*Montero v. Meyer*, 13 F.3d 1444 (10th Cir. 1994) .... 25

*Mortgage Finance, Inc. v. Podleski*, 742 P.2d 900 (Colo. 1987) .... 10, 15

*New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) .... 28

*Olim v. Wakinekona*, 461 U.S. 238, 103 S.Ct. 1741, 75 L.Ed.2d 813 (1983) .... 25

*Ownbey v. Morgan*, 256 U.S. 94, 41 S.Ct. 433, 65 L.Ed. 837 (1921) .... 22

## TABLE OF AUTHORITIES – Continued

Page

*Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976) . . . . . 25, 26

*Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972) . . . . . 24

*Pennzoil Co. v. Texaco*, 481 U.S. 1, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987) . . . . . 4, 7

*Pomeranz v. McDonald's Corp.*, 843 P.2d 1378 (Colo. 1993) . . . . . 19

*Price v. Public Service Co. of Colorado*, 1 F.Supp.2d 1216 (D.Colo. 1998) . . . . . 28

*Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980) . . . . . 6

*Pulliam v. Allen*, 466 U.S. 522, 104 S.Ct. 1970, 80 L.Ed.2d 565 (1984) . . . . . 4

*Ranger Ins. Co. v. District Court*, 647 P.2d 1229 (Colo. 1982) . . . . . 8

*Richards v. Jefferson County, Alabama*, 517 U.S. 793, 116 S.Ct. 1761, 135 L.Ed.2d 76 (1996) . . . . . 24

*Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923) . . . . . 27

*Russell Decker v. Browning-Ferris Industries of Colorado, Inc.*, 947 P.2d 937 (Colo. 1997) . . . 1, 5, 10, 11, 20

*San Diego Building Trades Council v. Garmen*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959) . . . . . 28

*Saunders v. Shaw*, 244 U.S. 317, 37 S.Ct. 638, 61 L.Ed. 1163 (1917) . . . . . 8

*Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948) . . . . . 22, 29

## TABLE OF AUTHORITIES – Continued

Page

*Smith v. Kalavity*, 536 P.2d 332 (Colo. App. 1975) ..... 6

*Soderlun v. Public Service Co.*, 944 P.2d 616 (Colo. App. 1997) ..................... 18, 19, 20, 27, 29, 30

*Thomas H. Decker v. Browning-Ferris Industries of Colorado, Inc.*, 903 P.2d 1150 (Colo. App. 1995) ..... 1, 9, 10

*Thomas H. Decker v. Browning-Ferris Industries of Colorado, Inc.*, 931 P.2d 436 (Colo. 1997) ....... *passim*

*Thomas H. Decker v. Browning-Ferris Industries of Colorado, Inc.*, No. 93 CA 1427, Unpublished Opinion (Colo. App. 1997) ........ 1, 5, 18, 19, 21, 28

*USI Properties East, Inc. v. Simpson*, 938 P.2d 168 (Colo. 1997) .................................... 25

*Wilson v. Aiken Indus., Inc.*, 439 U.S. 877, 99 S.Ct. 366, 58 L.Ed.2d 191 (1978) .......................3, 6

CONSTITUTIONS, STATUTES AND OTHER AUTHORITIES

U.S. Const., Amend. XIV ................. 8, 23, 25, 26

28 U.S.C. § 1257 ..................................... 2

28 U.S.C. § 2106 ..................................... 2

42 U.S.C. § 1983 ..................................... 3

Colo. Const. Art. 2, § 24 ............................ 7

Colorado Appellate Rule 2 ........................... 8

Colorado Appellate Rule 40 ...................2, 7, 17

Colorado Appellate Rule 54(b) ....................2, 7

Colorado Rule of Civil Procedure 1 ................. 7

Colorado Rule of Civil Procedure 7 ...............2, 7

## PETITION FOR CERTIORARI

Petitioner, Browning-Ferris Industries of Colorado, Inc. ("BFI"), employer-defendant in the state courts of Colorado, petitions for a writ of certiorari to review the orders and opinions of the Colorado Supreme Court, culminating in the Order (Appendix A) striking petitioner's "Combined Petition For Rehearing and Motion For Relief For Denial of Federal and State Constitutional Rights" (Appendix B), which orders and opinions deprived petitioner of its property without due process of law and denied petitioner the equal protection of Colorado common law.

## CITATIONS TO OPINIONS BELOW

*Thomas H. Decker v. Browning-Ferris Industries of Colorado, Inc.*, 903 P.2d 1150 (Colo. App. January 12, 1995). *Thomas Decker I* – Appendix L.

*Thomas H. Decker v. Browning-Ferris Industries of Colorado, Inc.*, 931 P.2d 436, 440-41 (Colo. January 13, 1997). *Thomas Decker II* – Appendix H.

*Thomas H. Decker v. Browning-Ferris Industries of Colorado, Inc.*, No. 93 CA 1427, Unpublished Opinion (Colo. App. October 23, 1997). *Thomas Decker III* – Appendix E.

*Russell Decker v. Browning-Ferris Industries of Colorado, Inc.*, 947 P.2d 937 (Colo. as modified December 8, 1997). *Russell Decker* – Appendix K.

## JURISDICTION

The Order by the Colorado Supreme Court sought to be reviewed is dated August 28, 1998. Appendix A-1. There, the Colorado Supreme Court refused to consider BFI's Combined Petition For Rehearing and Motion For Relief For Denial of Federal and State Constitutional Rights, Appendix B ("Motion For Constitutional Relief"), and ordered that the same be "STRICKEN." This petition for writ of certiorari is timely filed. The jurisdiction of this Court to review the Order by the Colorado Supreme

Court is founded on the United States Constitution and 28 U.S.C. § 1257 and 28 U.S.C. § 2106.

While the foregoing jurisdictional statement complies with S.Ct. Rule 14.1.(e), which directs that a petition contain a "concise statement of the basis for jurisdiction in this Court," petitioner addresses at this juncture, rather than in the Statement of the Case, *infra*, this Court's jurisdiction to review "a state-court judgment," which jurisdiction may depend on when, in both "the court of first instance and in the appellate courts, . . . the federal questions sought to be reviewed were raised" and "the manner and method of raising them." S.Ct. Rule 14.1.(g)(i). BFI first raised the federal questions in its Motion for Constitutional Relief, filed pursuant to Colorado Rule of Civil Procedure 7, Colorado Appellate Rules 40 and 54(b), and section 24, article II of the Constitution of the State of Colorado. Appendix B-1. BFI's Motion for Constitutional Relief was filed after the Colorado Supreme Court denied, Appendix C, BFI's petition for certiorari review, Appendix D, of *Thomas Decker III*, Appendix E. BFI's Motion for Constitutional Relief was filed within the time frame allowed by the foregoing Colorado Appellate Rules for petitions for rehearing.

As indicated by the issues presented here, *supra*, a jurisdictional issue may arise because of the unique circumstances of the deprivation of federal constitutional rights by the Colorado Supreme Court itself, notwithstanding BFI's good faith efforts to have the state supreme court justify BFI's apparent contract liability in accordance with either the established common law of contracts or under a properly propounded change by the Colorado Supreme Court of the state's common law of contracts, including the at-will employment contract. The Colorado Supreme Court's decision to deny review constituted the state act which made the judicial resolution of the claims brought against BFI arbitrary and violative of BFI's constitutional rights. Appendix B-2. *See Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71, 81, 108 S.Ct. 1645, 100 L.Ed.2d 62 (1988) ("This claim is properly before us under our appellate jurisdiction because the Mississippi Supreme Court, in denying appellant's Motion to Correct Judgment, upheld the validity of [the state statute] against appellant's federal constitutional claim.").

Had the Colorado Supreme Court granted BFI's petition for certiorari on the issue presented, Appendix D-2, no federal constitutional injury, or question thereon, would have arisen in the first instance. By its Motion for Constitutional Relief, petitioner not only gave the Colorado Supreme Court " 'a fair opportunity to address the federal question[s] that [are] sought to be presented here,' " *Adams v. Robertson,* 520 U.S. 83, ___, 117 S.Ct. 1028, 1029, 137 L.Ed.2d 203 (1997), but in fact gave the state high court the opportunity to reconsider its denial of certiorari and to found BFI's apparent contract liability on properly-propounded grounds of state common-law. *See Adams,* 117 S.Ct. at 1031 ("[r]equiring parties to raise issues below . . . avoids unnecessary adjudication in this Court by allowing state courts to resolve issues on state law grounds").

Given these unique circumstances, elaborated in the Statement of the Case, *infra,* this case falls within that relatively small but serious set of cases where " 'the denial of due process occurred in the order of the state appellate court.' " *Wilson v. Aiken Indus., Inc.,* 439 U.S. 877, 878, 99 S.Ct. 366, 58 L.Ed.2d 191 (1978) (Blackmun, J., concurring) (noting that in petitioner's application for reargument in the state supreme court "any deprival of federal due process is not suggested in so many words"). Petitioner submits that it committed no "procedural default" in this case, and that jurisdiction thus lies in this Court.[1]

---

[1] Petitioner respectfully informs the Court that it has filed a complaint for declaratory and/or prospective injunctive relief, pursuant to 42 U.S.C. § 1983 and other federal statutes, against respondent, Decker, and various Colorado state judicial officers,

Petitioner is aware that "[i]t has been repeatedly decided by this court that a federal question, when suggested for the first time in a petition for rehearing after judgment, is not properly raised so as to authorize this court to review the decision of the highest court of the state." *Bushnell v. Crooke Mining & Smelting Co.*, 148 U.S. 682, 689, 13 S.Ct. 771, 37 L.Ed. 610 (1893).[2] Even there, however, this Court found that "there is clearly presented no federal question, for no right, immunity, or authority under the constitution or laws of the United States was set up by the plaintiffs in error, or denied by the supreme court of Colorado, *nor did the judgment of that court necessarily involve any such question, or the denial of any such right.*" *Id.*, at 690 (italics added).

Here, in contrast, the decision by the Colorado Supreme Court to deny BFI's petition for certiorari *necessarily* involved BFI's federal constitutional rights to due process of law and to equal protection of the laws. The

---

including the justices of the Colorado Supreme Court, in the United States District Court for the District of Colorado, Case No. ___. *Cf. Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, 4, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987) ("The principal issue in this case is whether a federal district court lawfully may enjoin a plaintiff who has prevailed in a trial in state court from executing the judgment in its favor *pending appeal of that judgment to a state appellate court.*") (emphasis added); *Pulliam v. Allen*, 466 U.S. 522, 528, 104 S.Ct. 1970, 80 L.Ed.2d 565 (1984). *See also Kiowa Indian Tribe of Oklahoma v. Hoover*, 150 F.3d 1163, 1170 (10th Cir. 1998) ("*Pennzoil* demonstrates that asking a federal court to enjoin post-judgment collection procedures that allegedly violate a party's federal rights is distinguishable from asking a federal court to review the merits of the underlying judgment.").

[2] *See e.g., Campbell v. Louisiana,* ___ U.S. ___, 118 S.Ct. 1419, 1425, 140 L.Ed.2d 551 (1998) (" 'With "very rare exceptions," . . . we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review.' ").

Colorado Supreme Court's denial of BFI's petition for certiorari to review *Thomas Decker III* constituted the state decision which determined that BFI would suffer contract liability without due process of law and without the equal protection of law. This case is not unlike *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, where this Court found:

> There is still to be considered a question of jurisdiction which has been reserved till this stage of the opinion, for the answer to it becomes easier after a consideration of the merits has brought into clear relief the challenge to the judgment.

287 U.S. 358, 53 S.Ct. 145, 77 L.Ed. 360 (1932). Here, as detailed in the Statement of the Case, *infra*, the necessary involvement of federal due process and equal protection questions was announced by the Colorado Supreme Court itself in a companion opinion, *Russell Decker*, Appendix K, issued upon modification a month before BFI's time expired for filing a petition for certiorari in the Colorado Supreme Court to review *Thomas Decker III.*

While the Colorado Supreme Court's certiorari jurisdiction is discretionary, petitioner reasonably construed the Colorado Supreme Court's modified *Russell Decker* opinion as a direct invitation to file a petition for certiorari such as to afford the high court an opportunity to correct, *on state common law grounds*, what amounted to contract liability on a claim the elements and proofs of which had never been addressed by the Colorado Supreme Court or any other Colorado court.[3] *See Great*

---

[3] *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 483 n.16, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983) (an important policy "underlying the requirement that constitutional claims be raised in state court as a predicate to our certiorari jurisdiction is the desirability of giving the state court the first opportunity to consider a state statute or rule in light of federal constitutional arguments. A state may give the

*Northern*, 287 U.S. at 367 (noting both the "general rule that a constitutional question is urged too late, if put forward for the first time upon a petition for rehearing," and the "well-recognized exception" that the rule does not apply "where the grounds of the decision supply a new and unexpected basis for a claim by the defeated party of a denial of a federal right"); *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 85 n.9, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980) ("[T]his Court has held federal claims to have been adequately presented even though not raised in lower state courts when the highest state court renders an unexpected interpretation of state law or reverses its prior interpretation."); *Wilson*, 439 U.S. at 879 (noting both the rule that "certiorari will not be granted where a federal constitutional issue is raised here for the first time on review of a state-court decision," and the exception to that rule "whenever the federal issue arose from an unanticipated ruling of the state court").

The Colorado Supreme Court's "striking" of BFI's Motion For Constitutional Relief does not rest on an adequate and/or independent state ground. "Striking" petitions for rehearing of denials of petitions for certiorari is not a uniform practice of the Colorado Supreme Court. BFI's research reveals that at times the Colorado Supreme Court has elected to "deny," rather than to "strike," such petitions, indicating at the very least a range of discretion under its own rules of practice or custom.[4] *See Adams*, 520 U.S. at ___, 117 S.Ct. at 1029-30

---

statute [or rule] a saving construction in response to those arguments.").

[4] *See e.g., Smith v. Kalavity*, 536 P.2d 332, 333 (Colo. App. 1975) (noting that "[d]efendants' petition for a writ of certiorari was denied by the Colorado Supreme Court on November 19, 1973, and their petition for rehearing on the petition was denied December 10, 1973."); *Houdek v. Mobil Oil Corp.*, No. 94-1049, Petition for Writ of Certiorari to the Colorado Court of Appeals, United States Supreme Court (October Term, 1994), appending

(aggrieved party can defeat the assumption, "[w]hen the highest state court is silent on a federal question before us," that a federal question was not properly presented, by, *inter alia,* demonstrating "that the state procedural requirements could not serve as an independent state law ground for the state court's judgment"); *Pennzoil,* 481 U.S. at 15 ("We cannot assume that state judges will interpret ambiguities in state procedural law to bar presentation of federal claims.").

There is no Colorado state rule which prohibits petitions for rehearing of an order denying certiorari, and there are state rules which affirmatively allow motions for relief. These Colorado rules include Colo. Const. Art. 2, § 24, pursuant to which BFI has the right "to apply to those invested with the powers of government for redress of grievances, by petition or remonstrance." *See Pennzoil,* 481 U.S. at 15 (noting the "open courts" provision of the Texas Constitution and the Texas Supreme Court's "longstanding commitment" to provide "effective opportunity to raise [a person's] constitutional claims"). *See Lauren Corp. v. Century Geophysical Corp.,* 953 P.2d 200, 202 (Colo. App. 1998) ("First Amendment right to petition the government for redress of grievances necessarily includes the right of access to courts."). Colorado Rule of Civil Procedure 7 allows an application to the court by motion for an order for any relief without restriction, and Colorado Rule of Civil Procedure 1 provides that these rules "govern the procedure in the supreme court." *See Ellis v. Dixon,* 349 U.S. 458, 463, 75 S.Ct. 850, 99 L.Ed. 1231 (1955) ("It is established law that this Court is not finally concluded by the state court's determination as to the sufficiency of pleadings asserting a federal right.")

---

at 68a-69a Colorado Supreme Court Order which "denied" Petition for Rehearing filed pursuant to Colorado Appellate Rules 40 and 54(b)). *See Hathorn v. Lovern,* 457 U.S. 255, 263, 102 S.Ct. 2421, 72 L.Ed.2d 824 (1982) ("State courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to all similar claims.").

A Colorado "court always retains the inherent power to reconsider a prior ruling as long as the motion is made in a timely fashion." *Ranger Ins. Co. v. District Court*, 647 P.2d 1229, 1231 (Colo. 1982). *See also* Colorado Appellate Rule 2 ("for other good cause shown, the appellate court may . . . suspend the requirements or provisions of any of these rules in a particular case"). The Colorado Supreme Court's refusal, however, to exercise its discretionary review resulted in the deprivation of BFI's constitutional rights. As this Court stated in *Saunders v. Shaw*:

> But when the act complained of is the act of the supreme court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here . . . . The denial of rights given by the 14th Amendment need not be by legislation. It appears that shortly after the supreme court [of Louisiana] had declined to entertain the petition for rehearing the plaintiff in error brought the claim of constitutional right to the attention of the chief justice of the state by his assignment of errors. We do not see what more he could have done.

244 U.S. 317, 320, 37 S.Ct. 638, 61 L.Ed. 1163 (1917). For the foregoing reasons, BFI respectfully submits that this Court has jurisdiction to hear this critical case concerning the constitutional constraints on a state judiciary's exercise of power to propound the common law of the employment at-will contract and to deprive property thereunder.

## CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## STATEMENT OF THE CASE

The relevant facts of this petition consist largely of the judicial actions of the Colorado state courts, but in particular, of the Colorado Supreme Court. This Statement of the Case comprises the bulk of this petition, and the good reasons for granting the writ emerge from the following chronicle of the Colorado Supreme Court's exercise of judicial power unhinged from traditional or customary practice.

Respondent, Decker, formerly an at-will employee of BFI, brought suit in 1993 in a Colorado trial court "asserting that he had been discharged in violation of an alleged progressive discipline policy and that BFI had breached an express covenant of good faith and fair dealing in terminating his employment." *Thomas Decker I.* Appendix L-2. "After trial, the jury awarded Decker $600,000 for lost income, $80,000 in noneconomic damages for breach of the good faith covenant, and $680,000 in punitive damages predicated upon breach of the covenant." *Thomas Decker I.* Appendix L-2.

On appeal to the Colorado Court of Appeals, BFI contended that the "trial court erred in allowing Decker to present a tort claim for breach of a covenant of good faith and fair dealing." The Colorado Court of Appeals agreed. *Thomas Decker I.* Appendix L-10. The Colorado Court of Appeals expressly stated: "the parties agree that this claim was not submitted under a contract theory, but rather as a tort claim. Thus, again, we do not address whether, or under what circumstances, the breach of such an express or implied-in-fact covenant [of good faith and fair dealing] gives rise to a contract claim in the employment context, nor in this [employment] contract specifically." *Thomas Decker I.* Appendix L-10.

The Colorado Court of Appeals held: "because we conclude that no cause of action based upon a theory of breach of covenant of good faith and fair dealing may be presented in tort, the jury's award of noneconomic damages cannot stand. Moreover, because our supreme court has held that an award of punitive damages for breach of contract, even a willful and wanton breach, is improper, *Mortgage Finance, Inc. v. Podleski,* 742 P.2d 900 (Colo. 1987), that award must likewise be vacated." *Thomas Decker I.* Appendix L-14-15. The intermediate appellate court concluded: "because the cause was submitted to the jury on instructions covering both the cognizable contract claim and the improper tort claim, and it is impossible to discern from the special interrogatory verdict form under which theory the jury awarded economic losses [of predominantly future wages], prejudice to BFI must be presumed, and a new trial as to these damages must be awarded." *Thomas Decker I.* Appendix L-16.

The Colorado Supreme Court granted certiorari review of *Thomas Decker I* and a companion case, *Castillo v. BFI,* which cases were consolidated on appeal. *Thomas Decker II.* Appendix H-1-2. Certiorari review by the Colorado Supreme Court of *Thomas Decker I* was on the following two issues: "1. Whether the court of appeals erred in reversing the trial court's finding that the facts of the present case gave rise to a claim in tort for breach of the express covenant of good faith and fair dealing. 2. Whether the court of appeals erred in remanding this matter to the trial court for a new trial on damages after affirming the jury verdict of liability against BFI." *Russell Decker.* Appendix K-2, n.1. Later, the Colorado Supreme Court granted separate certiorari review in another companion case, *Russell Decker v. BFI,* where the Colorado Court of Appeals again determined "that no tort cause of action exists in Colorado for breach of an express covenant of good faith and fair dealing in the employment context." *Russell Decker*. Appendix K-1.

The Colorado Supreme Court issued its opinion, *Thomas Decker II*, on January 13, 1997. Appendix H-1. Despite how the claims were adjudicated in the trial court and how the issues were appealed in the Colorado Court of Appeals, and despite how those issues were framed for certiorari review, the Colorado Supreme Court early in its opinion launched its transformation of the case: "Although [Decker's] amended complaint[ ] characterized [the alleged breach of covenant of good faith and fair dealing] as a contract claim, the amended complaint [ ] requested compensatory, noneconomic and punitive damages with respect to this claim." *Thomas Decker II*. Appendix H-5. The Colorado Supreme Court elected not to explain why the request for punitive damages did not characterize the claim as a tort claim.

In fact, the Colorado Supreme Court acknowledged that the jury verdict included an award of punitive damages:

> The jury returned a verdict in favor of Decker and against BFI on the breach of disciplinary policy and breach of covenant of good faith and fair dealing claims. . . . [T]he jury found that BFI had terminated Decker in violation of both its progressive disciplinary policy and its express promise of fair treatment. The jury also found that BFI had willfully and wantonly breached its promises of good faith and fair dealing. The jury awarded Decker . . . an additional $680,000 in punitive damages on the claim of breach of covenant of good faith and fair dealing.

*Thomas Decker II*. Appendix H-6-7. The Colorado Supreme Court also acknowledged: "BFI filed post-trial motions which focused largely on the matter of the punitive damage award. BFI adopted the trial court's characterization of the covenant of good faith and fair dealing claim as a tort, and stipulated that the claim had been tried as a tort." *Thomas Decker II.* Appendix H-7. The Colorado Supreme Court expressly noted that Decker had argued in the trial court that "such a tort claim was analogous to the tort claim of breach of the implied covenant of good faith and fair dealing available in the context of insurance law." *Thomas Decker II.* Appendix H-7.

The Colorado Supreme Court recognized that "[t]hroughout the appellate proceedings before this court and the court of appeals, the parties have referred to the breach of the disciplinary policy claim as a 'contract' claim, and the breach of express covenant of good faith and fair dealing as a 'tort' claim. The primary issue presented which the parties framed for the court of appeals was whether Colorado recognized a tort claim for breach of an express covenant of good faith and fair dealing in the employment context." *Thomas Decker II.* Appendix H-8. "In Decker's case," as the Colorado Supreme Court itself acknowledged, "the court of appeals accepted the parties' characterizations of . . . the breach of covenant of good faith and fair dealing claim as a tort claim." *Thomas Decker II.* Appendix H-8. In concluding its review of the proceedings below it, the Colorado Supreme Court confirmed that: "In setting aside the award of $600,000 for lost income, the court of appeals concluded that it was impossible to discern from the special verdict form under which theory the lost income was awarded, and that it must be presumed that BFI had been prejudiced by the special verdict form." *Thomas Decker II.* Appendix H-9.

The Colorado Supreme Court expressly confirmed that on certiorari review "Decker and Castillo argue that tort claims for breach of express covenant of good faith and fair dealing are cognizable in Colorado in the employment context." *Thomas Decker II.* Appendix H-10. While the Colorado Supreme Court stated that it "reject[ed] this argument," it continued its transmutation of the case:

> As a preliminary matter, we note that the issues framed by the parties here and addressed by the

> court of appeals are in tension with the issues submitted to and determined by the juries in these cases. BFI maintains that in each case the claim for breach of express covenant of good faith and fair dealing was "tried as a tort." Decker and Castillo agree, and urge us to recognize the viability of such a tort in Colorado.

*Thomas Decker II.* Appendix H-10. The Colorado Supreme Court itself created the "tension" between the issues framed on appeal and the issues determined by the jury. Moreover, the high court forgot that the "issues framed by the parties here," meaning on certiorari review in the Colorado Supreme Court, were in fact the issues framed by the Colorado Supreme Court itself by virtue of its grant of certiorari on those issues.

Despite respondent, Decker's, appellate position urging recognition of such a tort, the Colorado Supreme Court pronounced that "[t]o the contrary, the language of the pleadings, instructions, and verdict forms establish the claims as contract claims." *Thomas Decker II.* Appendix H-10. The state high court chose to ignore the fact that the pleadings, instructions and verdict forms included a request by respondent for punitive damages, which damages are not available in Colorado on contract claims. The state high court chose to ignore the fact that the trial court ruled that the claim was brought in tort and that the trial court thus allowed the claim for, and the instructions on, punitive damages. The state high court chose to ignore the significance of the fact that the jury did indeed award respondent $680,000 in punitive damages. *Thomas Decker II.* Appendix H-24-25.

The Colorado Supreme Court continued its wholesale revision of the case on appeal: "While the issues framed for appeal properly sought review of the trial court's *implied conclusion* that a tort claim for breach of express covenant of good faith and fair dealing exists in Colorado, in determining what effect the contrary conclusion reached by the court of appeals might have on the jury verdicts, we consider those verdicts in light of the manner in which the cases were tried." *Thomas Decker II*. Appendix H-10-11 (italics added). Far from being an "implied conclusion," the Colorado Supreme Court itself recognized that the trial court ruled: " 'With regard to your [BFI's] objection concerning a punitive instruction on punitive damages as to the claim for breach of the covenant of good faith and fair dealing, I'm going to give that instruction because I believe that that claim, being in the nature of a tort claim – although it may have its origins in contract law – nonetheless, can be characterized fairly as a tort claim. . . . ' " *Thomas Decker II*. Appendix H-12. The Colorado Supreme Court itself found not only that these "rulings contributed to the *confusion* in these cases," but also that "these rulings in effect *altered the basic theory of recovery* established by the pleadings. . . . " *Thomas Decker II*. Appendix H-11-12 (italics added). The difficulty in transmogrifying the case was indicated by the Colorado Supreme Court itself when it stated: the "amended complaints characterized the breach of express covenant of good faith and fair dealing claims as claims for breach of contract, *although the amended complaints contained requests for punitive damages for the contractual breaches.*" *Thomas Decker II*. Appendix H-11, n.2 (italics added).

Nevertheless, the Colorado Supreme Court concluded: "The record thus reflects that the juries were not asked to find whether BFI owed or breached any legal duty of good faith and fair dealing to Decker and Castillo. Rather, the juries were asked to find, and did find, that BFI had made and breached promises of good faith and fair dealing to Decker and Castillo. The juries found that BFI breached contracts, not that BFI committed torts." *Thomas Decker II*. Appendix H-13-14. Apart from the embarrassing fact that the jury also awarded respondent $680,000 in punitive damages, the Colorado Supreme Court does not explain why the jury's supposed finding of a contract breach rather than commission of a tort does not simply result in Decker losing the appeal, and thus the entire case, since he specifically presented and appealed the claim as a tort claim in the state courts.

Indeed, respondent appealed the issue of punitive damages, asserting in the Colorado Supreme Court that "the court of appeals erred in reversing the judgments of punitive damages entered by the trial court." *Thomas Decker II.* Appendix H-24. The Colorado Supreme Court cited to its previous decision in *Mortgage Finance, Inc. v. Podleski,* 742 P.2d 900 (Colo. 1987), wherein it was "emphasized that the law of torts and the law of contracts reflect different policies and, therefore, recognize different remedies." *Thomas Decker II.* Appendix H-24. Apparently, the fact that respondent sought punitive damages in his complaint, the fact that respondent was awarded punitive damages by the jury, the fact that petitioner appealed the award of punitive damages, the fact that the intermediate court of appeals reversed the award of punitive damages and remanded for a new trial on damages, the fact that respondent then appealed the issue of punitive damages to the Colorado Supreme Court on the ground that Colorado does, or should, recognize the *tort* of breach of covenant of fair dealing, and the fact that petitioner briefed and resisted the issue on grounds that Colorado does not, and should not, recognize such a tort, all of these facts, singly or cumulatively, did not restrain the Colorado Supreme Court from forging a new liability, *ex contractu,* on a claim for breach of the covenant of fair dealing between an employer and an otherwise at-will employee tried and initially appealed *ex delicti.*

In finally addressing Decker's appeal of the punitive damages issue, the Colorado Supreme Court's transformation of the case takes a *surreal* turn: "Here, as in *Podleski,* we are faced with conduct which amounts to a breach of contract, and 'no tort claim was before the trial court at the conclusion of the trial.' " *Thomas Decker II.* Appendix H-25. No tort claim before the trial court? The Colorado Supreme Court itself earlier explicitly recognized that the trial court not only had a tort before it, but that it specifically ruled and decreed that it had a tort before it. Ignoring its own statements identifying the state trial court's judicial rulings on the record, the Colorado Supreme Court vacated the award of punitive damages, "as the court of appeals determined," without even the hesitation that might betray bad conscience.

Despite the fact that the Colorado Court of Appeals determined that the award of economic damages had to be vacated because, as the state Supreme Court itself acknowledged, it "was impossible to discern from the special verdict form under which theory the lost income was awarded, and that it must be presumed that BFI had been prejudiced by the special verdict form," *Thomas Decker II*, Appendix H-9, the Colorado Supreme Court nevertheless reversed the court of appeals decision on economic damages because now, on supreme court review, "both the claim for breach of the progressive disciplinary policy and the claim for breach of express covenant of good faith and fair dealing were pled, tried, and found by the jury to be breaches of an express contractual obligation." *Thomas Decker II*. Appendix H-27. No mention is made of the contrary stipulations of the parties, the contrary rulings of the trial court, or the contrary appellate record which reflected that the court of appeals "*accepted* the parties' characterizations of . . . the breach of covenant of good faith and fair dealing claim as a tort claim." *Thomas Decker II*. Appendix H-8 (italics added).

The Colorado Supreme Court then decided that the jury was properly instructed on damages:

> The juries' calculations of economic damages in these cases were limited by the instructions to 'back pay, loss of future pay and loss of benefits,' which are appropriate economic damages designed to put the wrongfully discharged employee in the same position he or she would have been in had the employer not breach[ed] the employment contract.

*Thomas Decker II*. Appendix H-27. The relevant jury instruction provided that in determining damages, the jury "shall consider . . . any economic losses incurred to the present time or which will probably be incurred in the future, including back pay, loss of future pay and loss of benefits." *Thomas Decker II*. Appendix H-26, n.9.

The Colorado Supreme Court did not explain how a jury instruction allowing "loss of future pay," without more, could be a proper *measure* of *contract* damages for breach of the covenant of fair dealing in an otherwise at-will employment relationship. The Colorado Supreme Court did not explain how a jury finding of "loss of future pay" puts an at-will employee "in the same position he or she would have been in had the employer not breach[ed] the employment contract." The Colorado Supreme Court concluded its opinion in *Thomas Decker II* by ordering a remand: "while we affirm the jury's finding that BFI is liable to Decker for economic damages, we remand Decker's case to the court of appeals for consideration of BFI's arguments challenging the amount of the jury's award of economic damages in that case." *Thomas Decker II*. Appendix H-29-30.

Pursuant to Colorado Appellate Rule 40, BFI petitioned the Colorado Supreme Court for rehearing, arguing, *inter alia*, that the Colorado Supreme Court "decided an issue that was not ruled upon by the court of appeals . . . . The court of appeals did not rule on whether contract claims exist, because the appeals were from the trial court's determinations that Colorado recognizes claims, *in tort*, for breach of the covenant of good faith and fair dealing in the employment context." Appendix I-2-3. BFI urged: "There was no suggestion, based upon the trial court's rulings, the issues before the court of appeals and its decisions, and the briefs filed by the parties at every stage of the proceedings, that this court was going to consider whether Colorado would adopt a claim, *in contract*, for breach of a covenant of good faith and fair dealing in the employment context." Appendix I-3-4.

BFI also apprized the Colorado Supreme Court of the recently rendered, intervening opinion of the Colorado

Court of Appeals in *Soderlun v. Public Service Co.*, 944 P.2d 616 (February 6, 1997). Appendix M. The *Soderlun* court held that express covenants of fair dealing "do not limit an employer's right to discharge without cause, unless there is an express or implied promise, independent of the covenant of good faith and fair dealing, restricting *that* right, i.e., specifically directed at the length of employment or conditions of termination." Appendix I-6. While *Soderlun* is a decision of the Colorado Court of Appeals, BFI argued that under *Soderlun* even the newly fashioned *contract* version of respondent's claim would fail.[5] BFI requested "a hearing on the issue of whether Colorado should recognize a claim *in contract* for breach of the covenant of good faith and fair dealing in employment cases, and whether *the facts of these cases* support this claim." In the alternative, BFI urged the Colorado Supreme Court to "remand the contract claim issue to the court of appeals. This would be consistent with this court's remand of the 'front pay' or 'lost future wages' issue to the court of appeals." Appendix I-8. BFI's petition for rehearing was denied by the Colorado Supreme Court on February 24, 1997. Appendix J.

Given the remand, BFI sought relief in the Colorado Court of Appeals by challenging not only the amount of the award but also the fact of damage itself. Appendix F-3. The Colorado Court of Appeals, in its remand opinion dated October 23, 1997, affirmed the entire lost wages award. *Thomas Decker III*. Appendix E. The Colorado Court of Appeals found that the testimony of Decker's expert economist at trial properly comprehended evidence of life-tenured employment or employment until normal retirement age. The Colorado Court of Appeals rejected BFI's argument that the award of $600,000 in lost future wages "reflects the application of an improper measure of damages." *Thomas Decker III*. Appendix E-5. The Colorado Court of Appeals also rejected BFI's argument, based on *Pomeranz v. McDonald's Corp.*, 843 P.2d 1378 (Colo. 1993), that the award violated the "rule of certainty" which "requires that a plaintiff show the fact of damage along with substantial evidence that, together with reasonable inferences to be drawn therefrom, provides a reasonable basis for computation of the damage." *Thomas Decker III*. Appendix E-6-7.

---

[5] The plaintiff-employee in *Soderlun* sought certiorari review in the Colorado Supreme Court, which was denied on October 20, 1997. Appendix M (see caption).

Pursuant to Colorado Appellate Rule 40, on November 6, 1997, BFI petitioned for rehearing of *Thomas Decker III* in the Colorado Court of Appeals. Appendix F. BFI did not rest with restating its arguments, but rather placed its confidence on the intermediate appellate court's own intervening opinion in *Soderlun*, arguing that the law as propounded in *Soderlun* dictated rehearing. In *Soderlun*, the Colorado Court of Appeals held:

> The [Colorado] supreme court has not purported to create any special rules to deal with employee claims of contract breaches. Hence, our analysis of the issues presented here must comport with traditional contract precepts.
>
> * * *
>
> Moreover, quite irrespective of the nature of the promise [by the employer], the common law generally requires that, to form the basis for an enforceable contract, a promise must be "reasonably certain"; that is, the promise must be sufficiently specific to "provide a basis for determining the existence of a breach and for giving an appropriate remedy."
>
> * * *
>
> Hence, whether an alleged promise is claimed to be part of an express contract or is asserted as the basis for the application of promissory estoppel, it must, in either event, be sufficiently specific so that the judiciary can understand the

> obligation assumed and enforce the promise according to its terms.

Appendix M-6, M-7. On the basis of *Soderlun,* in its petition for rehearing BFI urged the Colorado Court of Appeals that given the Colorado Supreme Court's transfiguration of the claim from tort to contract in *Thomas Decker II,* "the jury must first find the terms of the contract upon which it assesses and awards appropriate damages for loss of future wages." Appendix F-7. BFI also argued that "[s]ince damages for lost future pay necessarily implicates a term of future employment, the court must fashion a special rule . . . for employee claims of breaches of the promise of fair and equitable treatment in an otherwise at-will employment context." Appendix F-8. The Colorado Court of Appeals denied BFI's petition for rehearing on December 11, 1997. Appendix G.

Three days earlier, on December 8, 1997, the Colorado Supreme Court modified and reissued its opinion in *Russell Decker v. Browning-Ferris Industries of Colorado, Inc.,* 947 P.2d 937 (Colo. 1997), originally issued on October 27, 1997. Appendix K-10-16. The modifications to the opinion contained an astonishing revelation:

> Here, as in *Thomas Decker [II],* we accept the finding of the jury of a breach of an express contractual obligation without addressing the elements of such a claim or the proof necessary to sustain the claim. These issues are not before us and were not before us in *Thomas Decker [II].*
>
> * * *
>
> Although we recognize that the terms and conditions of an employment contract may be modified, neither in *Thomas Decker [II]* nor here do we abrogate Colorado's at-will employment doctrine.

Appendix K-8, K-12. Because this revelation came too late for BFI to present to the Colorado Court of Appeals on petition for rehearing of *Thomas Decker III,* BFI spotlighted them as the fundamental reasons for why certiorari review of *Thomas Decker III* should be granted by the Colorado Supreme Court.

Hence, in its petition for writ of certiorari, filed January 9, 1998, in the Colorado Supreme Court, the sole issue presented by BFI was as follows:

> Did the Court of Appeals err by refusing to address the elements of the new claim for breach of an implied-in-fact modification of an otherwise at-will employment contract and/or the proofs required to sustain the elements of such a claim, contrary to this Court's remand from *Thomas Decker v. Browning-Ferris Industries,* 931 P.2d 436 (Colo. 1997), as subsequently clarified by this Court's companion opinion in *Russell Decker v. Browning-Ferris Industries,* No. 96 SC 303 (1997 WL 672326) (as modified December 8, 1997)?

Appendix D-2. The Colorado Supreme Court denied BFI's petition for certiorari without comment on July 27, 1998. Appendix C.

Because the Colorado Supreme Court refused to found BFI's liability on proper state law grounds, BFI filed its Motion For Constitutional Relief on August 10, 1998. BFI moved the Colorado Supreme Court: "To grant BFI's Petition for Writ of Certiorari so as to determine the elements and the proofs required properly to sustain an award of damages for BFI's breach of the promise of fair treatment made to an otherwise at-will employee *and thus to bring BFI's contractual liability within established constitutional protections.*" Appendix B-2 (emphasis added). BFI's Motion for Constitutional Relief was "STRICKEN" by the Colorado Supreme Court on August 28, 1998. Appendix A-1.

## REASONS FOR GRANTING THE WRIT

Petitioner respectfully submits that the reasons for granting the writ are patent from the foregoing Statement of the Case, and what remains is the presentation of the constitutional law which confirms those reasons. In propounding the common law in general and in developing the common law governing at-will employment contracts in particular, the Colorado Supreme Court "cannot disregard the limitations which the Federal Constitution has applied to her power." *Ex Parte Virginia*, 100 U.S. 339, 346, 25 L.Ed. 676 (1879). "That the action of state courts and of judicial officers in their official capacities is to be regarded as action by the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court." *Shelley v. Kraemer*, 334 U.S. 1, 14, 68 S.Ct. 836, 92 L.Ed. 1161 (1948). This Court has also "established the proposition that judicial action is not immunized from the operation of the Fourteenth Amendment simply because it is taken pursuant to the state's common-law policy." *Id.*, at 20.

"The due process clause . . . restrains state action, whether legislative, executive, or judicial, within bounds that are consistent with the fundamentals of individual liberty and private property, including the right to be heard where liberty or property is at stake in judicial proceedings." *Ownbey v. Morgan*, 256 U.S. 94, 110-11, 41 S.Ct. 433, 65 L.Ed. 837 (1921). This Court's opinions have "strongly emphasized the importance of the procedural component of the Due Process Clause." *Honda Motor Co. Ltd. v. Oberg*, 512 U.S. 415, 420, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994). When the application of state common law is at issue, by state courts and/or by state jury, the constitutional focus is on any "departure from traditional procedures." *Id.*, at 421. As this Court has stated from its "first due process cases, traditional practice provides a touchstone for constitutional analysis." *Id.*, at 430.

The Colorado Supreme Court violated petitioner's Fourteenth Amendment rights by converting respondent's claim for breach of the covenant of fair dealing from tort to contract, by nullifying petitioner's adjudicatory process rights in the trial court and in the intermediate court of appeals, by stating, in a subsequent companion opinion, that it accepted the jury's award of lost future wages while nonetheless proclaiming that the elements of the transmogrified contract claim, and the proofs necessary to sustain that claim, were never issues on appeal, and by affirming liability in this case on the spectral claim while allowing other employers the benefits of established contract law.

## I. BY CONVERTING RESPONDENT'S CLAIM FOR BREACH OF COVENANT OF FAIR DEALING FROM TORT TO CONTRACT, THE COLORADO SUPREME COURT NULLIFIED PETITIONER'S POST-TRIAL MOTIONS AND INTERMEDIATE APPEAL, THUS DENYING BFI DUE PROCESS OF LAW.

On its face, the Colorado Supreme Court's opinion in *Thomas Decker II,* Appendix H, betrays its transgression of accepted and traditional trial and appellate practice. The court's conversion of respondent's claim from tort to contract, even as against the respondent's own contrary legal position at trial and on appeal, in effect annulled petitioner's post-trial motions and intermediate appeal contrary to due process of law. Due process "requires that a party have a full and fair opportunity to litigate *its* case." *Crocog Co. v. Reeves,* 992 F.2d 267, 270 (10th Cir. 1993) (citing *Kremer v. Chemical Constr. Corp.,* 456 U.S. 461, 482-82 & n. 24, 102 S.Ct. 1883, 72 L.Ed.2d 262 (1982) (emphasis added)). *See also Cole v. Arkansas,* 333 U.S. 196, 202, 68 S.Ct. 514, 92 L.Ed. 644 (1948) ("To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and *as the issues were determined in the trial court.*") (emphasis added).

The Colorado Supreme Court itself found that "[i]n view of the trial court's characterization of the claims of good faith and fair dealing as 'tort' claims, in its motion for new trial and on appeal BFI has argued that no such tort claim is cognizable in Colorado." *Thomas Decker II.* Appendix H-14. In converting the "tort" claim to contract, and then affirming liability on that newly converted claim, the state high court in effect stripped petitioner of its right under existing state practice to defend and be heard on the claims against it at two different state adjudicatory levels, trial and intermediate appeal. Affirming the damage award, the Colorado Supreme Court thereby denied petitioner its property without due process of law. *See e.g., Ewy v. Sturtevant,* ___ P.2d ___, 1998 WL 251661 (Colo. App. May 14, 1998) (" 'property' denotes a broad range of interests that are secured by 'existing rules or understandings.' ") (citing *Perry v. Sindermann,* 408 U.S. 593, 601, 92 S.Ct. 2694, 2699, 33 L.Ed.2d 570 (1972)). *See also Honda Motor,* 512 U.S. at 430 ("When the absent procedures would have provided protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of due process."); *Richards v. Jefferson County, Alabama,* 517 U.S. 793, 804, 116 S.Ct. 1761, 135 L.Ed.2d 76 (1996) (a "chose in action" is a "protected property interest in its own right").

## II. THE COLORADO SUPREME COURT DENIED BFI DUE PROCESS OF LAW BY AFFIRMING DAMAGES SOLELY *EX CONTRACTU* WHEN THE PARTIES STIPULATED, AND THE TRIAL COURT RULED, THAT THE CLAIM FOR BREACH OF COVENANT OF FAIR DEALING WAS LITIGATED *EX DELICTO*.

The Colorado Supreme Court's rejection of the stipulations between petitioner and respondent that the breach of covenant of fair dealing was litigated as a tort claim, and its rejection of the understanding between BFI and the state trial court, upon post-trial motions proceedings, "that the claim had been tried as a tort," *Thomas Decker II*, Appendix H-7, constitute deprivations of due process of law. In *Paul v. Davis*, this Court held:

> It is apparent from our decisions that there exists a variety of interests which are difficult of definition but are nevertheless comprehended within the meaning of either "liberty" or "property" as meant in the Due Process Clause. These interests attain this constitutional status by virtue of the fact that they have been initially recognized and protected by state law, and we have repeatedly ruled that the procedural guarantees of the Fourteenth Amendment apply whenever the State seeks to remove or significantly alter that protected status.

424 U.S. 693, 710-11, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976) (note omitted). "Whether an interest created by state law rises to the level of a 'liberty interest' protected by the Due Process Clause of the Fourteenth Amendment is a matter of federal law." *Montero v. Meyer*, 13 F.3d 1444, 1447 (10th Cir. 1994) (citing *Olim v. Wakinekona*, 461 U.S. 238, 244 n.5, 103 S.Ct. 1741, 75 L.Ed.2d 813 (1983)).

It is established in Colorado that relevant stipulations by the parties are honored by appellate courts and that disregarding those stipulations amounts to violation of due process. In *Colorado River Water Conservation District v. Bar Forty Seven Co.*, 579 P.2d 636 (Colo. 1978), the Colorado Supreme Court held that a trial judge's refusal to give effect to a stipulation of the parties was arbitrary and capricious and thus reversible error. Similarly, in *Hendricks v. Industrial Claim Appeals Office*, 809 P.2d 1076, 1077-78 (Colo. App. 1990), the Colorado Court of Appeals found that "it was a violation of procedural due process for the [administrative law judge] and the Panel [of the Industrial Claim Appeals Office] to disregard the parties' express stipulation that the issue of maximum medical improvement was premature." Indeed, in *USI Properties*

*East, Inc. v. Simpson,* 938 P.2d 168, 175 (Colo. 1997), the Colorado Supreme Court "recognize[d] that stipulations are a form of judicial admission which are binding on the parties who make them." Hence, good faith stipulations made in the course of litigation, and which do not impinge on such matters as a court's jurisdiction, are "interests" which have attained "constitutional status by virtue of the fact that they have been initially recognized and protected by state law." *Paul, supra.*

In *Evitts v. Lucey,* for example, this Court found that "the stipulation in the District Court on remand limits our inquiry solely to the validity of the state court's action under the Due Process Clause of the Fourteenth Amendment." 469 U.S. 387, 392, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). In that case, "[o]n remand, counsel for both parties stipulated that there was no equal protection issue in the case, the only issue being whether the state court's action in dismissing respondent's appeal violated the Due Process Clause." *Id.* at 391. Similarly, here, the relevant stipulations of the parties should have limited the Colorado Supreme Court's inquiry on appeal to respondent's assertions that Colorado recognizes a tort for breach of covenant of fair dealing in the employment context.

## III. THE STATE SUPREME COURT DENIED BFI DUE PROCESS OF LAW BY ACCEPTING THE JURY'S VERDICT WHILE PROCLAIMING THAT THE ELEMENTS OF THE NEW CLAIM, AND THE PROOFS NECESSARY TO SUSTAIN THAT CLAIM, WERE NEVER ISSUES ON APPEAL.

This Court has recognized that the "process of trial and error, of change of decision in order to conform with changing ideas and conditions, is traditional with courts administering the common law. Since it is for the state courts to declare and interpret the law of the State, it is for them to correct their errors and declare what the law has been as well as what it is." *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673, 682 n.8, 50 S.Ct. 451, 74

L.Ed. 1107 (1930). As shown in the Statement of the Case, *supra,* the Colorado Supreme Court not only failed to correct its own errors, but refused to declare what the law of the employment contract has been and what that law is now.

But this case is no mere complaint of judicial errors. Rather, this case exemplifies the exercise of state judicial power which has not only departed from its traditional practice, but has positively transgressed federal constitutional bounds. *Brinkerhoff-Faris,* 281 U.S. at 682 ("while it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law").

Petitioner notes that this Court's Rule 10 on considerations governing review on certiorari provides that "a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." BFI does not assert here the mere judicial error of a misapplied, albeit properly stated, rule of Colorado common law. Far from it. The Colorado Supreme Court affirmed a damage award *ex contractu* while expressly holding:

> Here, as in *Thomas Decker,* we accept the finding of the jury of a breach of an express contractual obligation without addressing the elements of such a claim or the proof necessary to sustain the claim. These issues are not before us and were not before us in *Thomas Decker.*

Appendix K-8. In effect, the Colorado Supreme Court confessed that there were no rules of common law applied at all, either properly or improperly stated. Such rules do not exist. *Soderlun* ("The [Colorado] supreme court has not purported to create any special rules to deal with employee claims of contract breaches."). Appendix M-6. *See Rooker v. Fidelity Trust Co.,* 263 U.S. 413, 415, 44 S.Ct. 149, 68 L.Ed. 362 (1923) (finding that the suit was not in the federal district court's jurisdiction because, *inter alia,* the state "judgment was responsive to the issues"); *Evitts,* 469 U.S. at 404 (due process principles violated when appeal decided "in a way that was arbitrary with respect to the issues involved").

In *BMW of North America, Inc. v. Gore,* 517 U.S. 559, 573 n.17, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996), this Court stated: "State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute."[6] Here, the Colorado Supreme Court accepted the state power as exercised by the jury which jury had no state rule to apply at all. No Colorado court, appellate or otherwise, has addressed, much less established, the proper elements of a claim for breach of covenant of good faith and fair dealing in the at-will employment context, which elements are necessary to guide both trial judge and jury in the adjudication of the claim. By virtue of the Colorado Supreme Court's refusal to determine the issue as presented in BFI's petition for certiorari to review *Thomas Decker III,* the unconstitutional result is that BFI is liable for damages now amounting to more than $600,000 on an imaginary claim. *Cf. Price v. Public Service Co. of Colorado,* 1 F.Supp.2d 1216, 1226 (D.Colo. 1998) ("A contract for permanent employment is no more than employment terminable at will unless there is an express stipulation as to duration or special consideration.") (citing *Pittman v. Larson Distrib. Co.,* 724 P.2d 1379, 1383 (Colo. App. 1986).

---

[6] *See also New York Times Co. v. Sullivan,* 376 U.S. 254, 265, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) ("The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised."); *San Diego Building Trades Council v. Garmen,* 359 U.S. 236, 247, 79 S.Ct 773, 3 L.Ed.2d 775 (1959) ("regulation can be as effectively exerted through an award of damages as through some form of preventive relief").

## IV. THE COLORADO SUPREME COURT DENIED BFI EQUAL PROTECTION OF STATE LAW BY IMPOSING CONTRACT LIABILITY FOR LOST FUTURE WAGES WHEN OTHER EMPLOYERS WHO MAKE SIMILAR PROMISES OF FAIR DEALING ARE FREE FROM SUCH LIABILITY WHEN NO DEFINITE TERM OF FUTURE EMPLOYMENT IS EXPRESSED OR IMPLIED IN THE EMPLOYER'S PROMISE.

Petitioner's charge that the Colorado Supreme Court denied petitioner equal protection of Colorado law is not a claim of lack of uniformity in the state's judicial decisions or that the Colorado Supreme Court committed simple judicial error. *See e.g., Beck v. Washington,* 369 U.S. 541, 554, 82 S.Ct. 955, 8 L.Ed.2d 98 (1962). On the contrary, the charge is that BFI has been irrationally selected by the Colorado Supreme Court to suffer a damage award on an imaginary claim which the state court itself conceded lacked judicial definition as to its elements and as to the proofs required to sustain those elements. No other Colorado employer has been, or ever will be, subjected to such arbitrary liability, given the authority of *Soderlun.* Appendix M. *See Shelley,* 334 U.S. at 18 n.19 ("it is clear that the common-law rules enunciated by state courts in judicial opinions are to be regarded as part of the law of the State").

Under the law as propounded in *Soderlun,* respondent would have had to allege and prove that BFI's promise of fair treatment contained an express or implied term of future employment. Such a term was never claimed, alleged, pleaded or proved by the plaintiff, nor has BFI ever had the chance to defend against such a claim by submission of evidence, by cross-examination or by any form of defense whatsoever. Hence, BFI has been denied the protection of the laws afforded to other similarly situated Colorado employers. There is no rational basis to treat BFI differently from the employer-defendant in *Soderlun* with regard to employee claims of implied in fact modifications of the at-will employment relationship.

The *Soderlun* Court held that the employer's statements allegedly creating a contract of future employment must be "sufficiently definite *to allow a court to understand the nature of the obligation undertaken.*" 944 P.2d at 621 (emphasis added). Yet, here, the Colorado Supreme Court itself found that the state trial court affirmatively understood and ruled that respondent's claim was a tort. BFI has been denied the protection afforded by the law which requires that any court in which a Colorado defendant is summoned to answer in damages for claims of breach of contract, that court must understand the contract alleged by the plaintiff and the specific obligations alleged by the plaintiff to arise thereunder. The action of the Colorado Supreme Court here is thus irrational both facially and as applied to BFI.

## CONCLUSION

Given the serious state judicial constitutional deprivations in this case, this Court should grant BFI's Petition for a Writ of Certiorari.

Respectfully submitted,

JOHN N. MCNAMARA, JR.
*(Counsel of Record)*
RICARDO M. BARRERA
(Special Counsel)
MCNAMARA LAW FIRM, P.C.
Suite 100
1660 17th Street
Denver, Colorado 80202
Tel: 303.572.1660

*Counsel for Petitioner*

November 11, 1998

## APPENDIX A

SUPREME COURT, STATE OF COLORADO
CASE NO. 98SC14
CERTIORARI TO THE COLORADO
COURT OF APPEALS, 93CA1427
DISTRICT COURT, ADAMS COUNTY, 92CV185

---

### ORDER OF COURT

---

BROWNING-FERRIS INDUSTRIES OF
COLORADO, INC.,

Petitioner,

v.

THOMAS H. DECKER,

Respondent.

---

Upon consideration of the Combined Petition for Rehearing and Motion for Relief for Denial of Federal and State Constitutional Rights, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Combined Petition for Rehearing and Motion for Relief shall be, and the same hereby is, STRICKEN.

BY THE COURT, AUGUST 28, 1998.

cc:

John N. McNamara, Jr.
1669 17th Street #100
Denver, CO 80202

Stefan Kazmierski
Bridgers & Kazmierski, L.L.C.
6200 S Syracuse Way, #125
Englewood, CO 80112-4738

Patrick H. Stanford, Clerk
Colorado Court of Appeals

# APPENDIX B

SUPREME COURT, STATE OF COLORADO

Case No. 98 SC 14

---

## COMBINED PETITION FOR REHEARING AND MOTION FOR RELIEF FOR DENIAL OF FEDERAL AND STATE CONSTITUTIONAL RIGHTS

---

**BROWNING-FERRIS INDUSTRIES of COLORADO, INC.,**

**Petitioner and Movant,**

v.

**THOMAS H. DECKER,**

**Respondent.**

---

**McNAMARA LAW FIRM, P.C.**
John N. McNamara, Jr. #2471
Suite 100
1660 17th Street
Denver, Colorado 80202
Tel: 303.572.1660

*counsel for petitioner*

**August 10, 1998**

Pursuant to C.R.C.P. 7 and/or C.A.R. 40 and 54(b), and section 24, article II, Colo. Constitution, Browning-Ferris Industries of Colorado, Inc., ("BFI"), erstwhile petitioner for writ of certiorari, now respectfully petitions for rehearing and moves this honorable Court to issue an order for the following relief:

(1) To withdraw its Order in this action, dated July 27, 1998, denying BFI's Petition for Writ of Certiorari to the Court of Appeals, No. 93CA1427, *pending* disposition of this Petition and Motion raising federal and state constitutional claims arising in the first instance as a direct consequence of said denial of certiorari; and

(2) To grant BFI's Petition for Writ of Certiorari so as to determine the elements and the proofs required properly to sustain an award of damages for BFI's breach of the promise of fair treatment made to at [sic] otherwise at-will employee and thus to bring BFI's contractual liability within established constitutional protections.

Prior to this Court's denial of certiorari BFI's constitutional rights were only poised for injury. Grant of certiorari on the issue presented for review could have averted injury to BFI's constitutional rights. However, as a direct consequence of this Court's denial of certiorari, given the *judicial* circumstances of this litigation, BFI has suffered constitutional injury, including denial of due process of law, denial of equal protection of the laws, infliction of retrospective judicial legislation and arbitrary impairment of contract.

As matters now stand, no Colorado court, appellate or otherwise, has addressed, much less established, the proper contract measure of damages to guide both judge and jury in this breach of contract case, which measure of damages is an essential element and predicate of the contract claim recognized by this Court for BFI's breach of the promise of fair treatment made to an otherwise at-will employee. By virtue of this Court's refusal to determine the issues presented in BFI's petition for certiorari, BFI has been denied the legal process due of defending against a new claim for all lost future wages of lifetime, permanent employment. The unconstitutional result here is that BFI is liable for damages for such a breach, amounting to an admitted "lifetime annuity" of over $600,000.00 awarded to the former employee, despite this Court's express judicial *acknowledgment* that:

> Here, as in *Thomas Decker* [*v. Browning-Ferris Industries of Colorado, Inc.*, 931 P.2d 436 (Colo. 1997) ("*Thomas Decker II*")], **we accept the finding of the jury of a breach of an express contractual obligation without addressing the elements of such a claim or the proof necessary to sustain the claim.**

*Russell Decker v. Browning-Ferris Industries of Colorado, Inc.*, 947 P.2d 937, 940 (Colo. 1997) (emphasis added).[1] BFI respectfully submits that by virtue of its present liability amounting to an undisputed "lifetime annuity" of over $600,000.00, *see Thomas Decker III*, slip op. at 9-11 (Rothenberg, J., dissenting), the promise or contract of fair treatment in an otherwise at-will employment relationship has been unconstitutionally transformed by the Colorado appellate courts into a promise or contract of lifetime, permanent employment.

---

[1] Those issues were presented by BFI to the Court of Appeals below, together with a request for a new trial on damages, but that court ignored those issues entirely and thus failed to address the elements of the claim and the proofs necessary to sustain the claim. Instead, the Court of Appeals applied a standard of review based on tort cases and *only tort* cases in upholding the award of all future wages for a lifetime of employment with BFI. *Thomas Decker v. Browning-Ferris Industries of Colorado, Inc.*, No. 93 CA 1427, Slip Opinion at 1-3 ("*Thomas Decker III*"), citing *Keohane v. Stewart*, 882 P.2d 1293 (Colo. 1994) (damages for *tort* of defamation); *Jackson v. Moore*, 883 P.2d 622 (Colo. App. 1994) (wage-loss award for *negligence* causing employment-related injury); *Lee's Mobile Wash v. Campbell*, 853 P.2d 1140 (Colo. 1993) (damages in *tort* for rear-end collision); *Cottingham v. Star Bus Line*, 152 Colo. 188, 381 P.2d 25 (1963) (damages for *tort* resulting from auto collision);

BFI submits that because it has never been heard, nor given the opportunity to be heard, on a claim for breach of the promise of permanent employment, yet now is burdened by the liability for damages for what amounts to a breach of the promise of permanent employment, it has been denied both procedural and substantive due process of law contrary to the federal and state constitutions. *U.S. Const., Amend XIV* ("nor shall State deprive any person of life, liberty, or property, without due process of law"); *Colo. Const., Art. II, Sec. 25.*

Immediately following the Court's above-quoted acknowledgment that the elements and sustaining proofs of the claim recognized by the Court have not been addressed, is the following supposed justification for the jury's damage award:

> In addition, the jury's calculation of economic damages was limited to "back pay, loss of future pay and loss of benefits." We conclude that the economic damage award is appropriate because it was "designed to put the wrongfully discharged employee in the same position

---

and *Good v. A.B. Chance Co.*, 39 Colo. App. 70, 565 P.2d 217 (1977) (damages for *tort* of wrongful death).

> he . . . would have been in had the employer not breach[ed] the employment contract."

*Russell Decker,* 947 P.2d at 940-41. However, because it is undisputed that the award of damages here was for *all* lost future wages, that is, for all of the lost wages which would have been earned by way of lifetime employment with BFI, that award is appropriate for a claim for breach of the promise of permanent employment. *Cf. Price v. Public Service Co. of Colorado,* 1 F.Supp.2d 1216, 1226 (D.Colo. 1998) ("In Colorado . . . courts recognize the ability to contract for permanent employment.") (citing *Soderlun v. Public Service Co. of Colorado,* 944 P.2d 616, 621 (Colo. App. 1997)). In other words, that award may be appropriate for the "position" of a life-tenured employee. However, there was absolutely no evidence presented in this case, nor did the plaintiff-employee allege, plead or prove, that the promise of fair treatment implied that he would have been in the position of a life-tenured employee but for BFI's breach of that promise.[2]

The jury's award in this case is *not* appropriate on a claim for breach of the promise of fair treatment, without more, which is the precise claim recognized by this Court in this case. Because BFI has never had the opportunity to present any evidence whatsoever to rebut a claim for breach of a contract for permanent employment, and because BFI has never had the opportunity to present a defense against a claim for permanent employment, and further because the plaintiff-employee in this case never presented any evidence whatsoever of any promise or contract of permanent employment, BFI has, as a result, suffered deprivation of both procedural and substantive due process at the hands of judicial branch of state government. *See Mathews v. Eldridge,* 424 U.S. 319, 334-35 (1976). *See also American Surety Co. v. Baldwin,* 262 U.S. 170, 171 (1923) ("due process requires that there be an opportunity to present every available defense"); *City and County of Denver v. Eggert,* 647 P.2d 216, 224 (Colo. 1982) ("The due process of the Colorado Constitution, Art. 11, Sec. 25, 'requires at a minimum the same guarantees as those protected by the due process clause of the federal constitution under the fourteenth amendment.' ").

---

[2] *See BMW of North America, Inc. v. Gore,* 517 U.S. 559, 573 n.17 (1996) ("State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute."); *New York Times Co. v. Sullivan,* 376 U.S. 254, 265 (1964) ("The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised."); *San Diego Building Trades Council v. Garmen,* 359 U.S. 236, 247 (1959) ("regulation can be as effectively exerted through an award of damages as through some form of preventive relief").

It is undisputed that BFI, as a corporation, is entitled to due process of law. *See Helicopteros Nacionales de Columbia v. Hall,* 466 U.S. 408 (1984). It is further beyond dispute that a person can be deprived due process of law by the judicial branch of state government. "The [United States] Supreme Court has analogized due process to the Magna Carta's 'guarantees against the oppressions and usurpations' of the royal prerogative, in support of the basic conclusion that due process 'is a *restraint* on the legislative as well as on the executive and *judicial powers* of the government, and cannot be so construed as to leave congress [or the states] free to make any process "due process of law," by its mere will.' "[3] The refusal by the courts of Colorado, including this Court by virtue of denial of certiorari, to establish the elements of the breach of the promise of fair treatment, including the crucial *missing* element of the *term of employment* presumably implied in the promise of fair treatment, which missing contract term is necessary to guide the *discretion of judge and jury on* the contract claim recognized by this Court, is yet another basis for BFI's present claim that it has been denied due process of law as guaranteed by the federal and state constitutions. *See Mathews v. Eldridge,* 424 U.S. 319, 334-35 (1976) ("[O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by official action; second, the risk of an erroneous deprivation of such interest *through the procedures used,* and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest. . . . "); *Eggert,* 647 P.2d at 224 (" 'The essence of procedural due process is fundamental fairness. This embodies adequate advance notice and an opportunity to be heard prior to state action resulting in deprivations of a significant property interest." ').

BFI respectfully submits that this Court's denial of its writ of certiorari also has the effect of a denial of BFI's right to the equal protection of the laws. *U.S. Const., Amend XIV* ("nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws"); *Colo. Const., Art. II, Sec. 6. See Metropolitan Life Ins. V Ward,* 470 U.S. 869 (1985) (corporation entitled to equal protection of the law). *See also Spicuzza v. Fonseca,* 537 So.2d 272, 275 (La. App. 1988) (rational basis review of equal protection claim "just as applicable to judicially fashioned law"). In *Soderlun v. Public Service Co.,* 944 P.2d 616 (Colo. App. 1997), *cert. denied* (October 20, 1997), a case upon which in part BFI based its petition for certiorari,[4] the Court of Appeals reversed jury verdicts on claims against the defendant-employer by ex-employees who alleged that their terminations violated, *inter alia,* "an *express* covenant of good faith and fair dealing." 944 P.2d at 618 (emphasis added). The *Soderlun* Court found:

---

[3] Laurence H. Tribe, *American Constitutional Law,* Second Ed., (New York: The Foundation Press) (1988), p. 664 (citing *Hurtado v. California,* 110 U.S. 516, 531 (1884), and *Murray's Lessee v. Hoboken Land & Improvement Co.,* 59 U.S. (18 How.) 272, 276 (1855)).

> [Q]uite irrespective of the nature of the promise, the common law generally requires that, to form the basis of an enforceable contract, a promise must be 'reasonably certain'; that is, the promise must be sufficiently specific to 'provide a basis for determining the existence of a breach and for giving an appropriate remedy. . . .
>
> Hence, whether an alleged promise is claimed to be part of an express contract or is asserted as the basis for the application or promissory estoppel, it must, in either event, be sufficiently specific so that the judiciary can understand the obligation assumed and enforce the promise according to its terms.

---

[4] *Soderlun* was also presented to the Court of Appeals on petition for rehearing in *Thomas Decker III,* to no avail.

944 P.2d at 620. Presumably, the Court's opinion in *Soderlun* is the law of Colorado, applicable to all similarly situated Colorado employers and employees. As such, BFI is entitled to the protection of the law as expounded by the *Soderlun* Court. If so protected, then BFI's promise of fair treatment most assuredly cannot be found to contain an "express" term of permanent employment, and even if the promise of fair treatment can be said to contain an "implied" term of permanent employment, such an implied term was never claimed, alleged, pleaded or proved by the plaintiff, nor has BFI ever had the chance to defend against such a claim by submission of evidence, by cross-examination or by any form of defense whatsoever. Hence, BFI has been denied the protection of the laws afforded to other similarly situated Colorado employers. There is no rational basis to treat BFI differently from Public Service Company with regard to implied in fact modifications of the at-will employment relationship.

The *Soderlun Court* also held that the employer's statements allegedly creating the contract of permanent employment must be "sufficiently definite *to allow a court to understand the nature of the obligation undertaken.*" 944 P.2d at 621 (emphasis added). Presumably, this too is the law of Colorado. Yet, this Court expressly found that "the issues framed by the parties here and addressed by the court of appeals are in *tension* with the issues submitted to and determine by the jur[y]," and that "[c]ertain trial court rulings contributed to the *confusion* in these cases." *Thomas Decker II,* 931 P.2d at 440-41 (emphasis added). BFI submits that this "tension" and this "confusion" bespeak the need for a new trial, and cannot and should not constitute the license for this Court to ignore the stipulations of the parties and the stipulations made to the trial court in good faith reliance that such stipulations would constitute the law of the case at trial and on appeal.[5]

On the authority of this Court's own findings in this case, BFI is now liable for an extravagant and excessive money judgment for loss of lifetime wages on a claim for breach of an otherwise indefinite promise of fair treatment, in a trial court which not only did not "understand the nature of the obligation undertaken," *Soderlun*, 944 P.2d at 621, but which trial court affirmatively understood it to be an obligation the violation of which constituted a tort. Because the employer-defendant in *Soderlun* was absolved from all contractual liability by the Court of Appeals by virtue of the fact that the employee-plaintiff could not establish an essential term of the alleged contract, namely, the implied term of future employment, BFI respectfully submits that it has been denied the equal protection of the law, namely, the common law of Colorado as recognized by the Colorado Court of Appeals in *Soderlun*. BFI has been denied the protection afforded by the law which requires that any court in which a Colorado defendant is summoned to answer in damages for claims of breach of contract, that court must understand the contract alleged by the plaintiff and the specific obligations alleged by the plaintiff to arise thereunder.

---

[5] BFI respectfully submits that this rejection of the stipulations and agreements between the parties that the breach of the covenant of fair treatment was a tort claim and the stipulation by BFI to the trial court upon post-trial motions "that the claim had been tried as a tort," *Thomas Decker II*, 931 P.2d at 439, constitutes an independent deprivation of both due process and equal protection. In *Hendricks v. Industrial Claim Appeals Office*, 809 P.2d 1076, 1077-78 (Colo. App. 1990), the Court found agreed [sic] that "it was a violation of procedural due process for the ALJ and the Panel to disregard the parties' express stipulation that the issue of maximum medical improvement was premature." *See also Colorado River Water Conservation District v. Bar Forty Seven Co.*, 579 P.2d 636 (Colo. 1978) (holding judge's refusal to give effect to a stipulation of the parties as arbitrary and capricious and reversible error).

This Court also expressly found that the trial court ruled that the breach of covenant " 'claim, being in the nature of a tort claim-although it may have its origins in contract law – nonetheless, can be characterized fairly as a tort claim.' " This Court further found that "[w]hile these rulings in effect altered the basic theory of the recovery established by the pleadings, no effort was made to inform the jury of such change." *Thomas Decker II*, 931 P.2d at 441 and n.3. Does the Court mean by this that the trial court's understandings and rulings are superfluous and of no legal consequence? BFI submits that that is the effect of this Court's jurisprudence in this case. In the same breath, this Court reduces the legal significance of the trial court's rulings to zero, and elevates what the jury was or was not informed of to the status of absolute dispositive significance. The principles of due process of law forbid such post hoc revision of the proceedings below.

In its apparent eagerness to credit the pure contract case heard by the jury as opposed to the tort case which the parties agreed was the claim tried, and which was the claim established by the trial court's rulings, the Court proves by its own words that BFI has been denied due process of law. The Court itself found that at trial on post-trial motions before the trial court:

> BFI adopted the trial court's characterization of the covenant of good faith and dealing claim as a tort, and stipulated that the claim had been tried as a tort. BFI argued that Colorado did not recognize a tort claim for breach of an express covenant of good faith and fair dealing in the employment context.

931 P.2d at 439. The trial court disagreed, and in *Thomas Decker I,* the Court of Appeals reversed. The violation of due process in this case thus includes the deprivation of BFI's right to file appropriate post trial motions on a contract claim only later recognized by this Court as the *real* claim in this case.

In other words, this Court's *post hoc* substitution of the understandings, stipulations and agreements not only between the parties at trial and on appeal in the Court of Appeals, but also between the parties and the trial court as evidenced by the trial court's rulings and orders, with its view of what the jury *really* decided, has at last one clear unconstitutional consequence: BFI has been denied the basic and fair process of law afforded by post-trial motion procedure.[6] This highly irregular rejection of the judicial components of the proceedings below and the displacement of those proceedings by conclusions which turn on a view of the real issues determined by the jury, could have been rendered harmless upon remand to the Court of Appeals by this Court in *Thomas Decker II*. The Court of Appeals, however, ignored the substantive issues on remand in *Thomas Decker III*. *Cf Sullivan v. Stark*, 808 F.2d 737, 741 (10th Cir. 1987) ("On remand if the district court finds there was a valid [employment] contract for a term, it shall decide what kind of hearing due process requires in the circumstances at issue. . . . "). Again, any potential constitutional injury resulting from this Court's irregular procedure also could have been averted by this Court's grant of certiorari to review the Court of Appeals' in *Thomas Decker III*. However, because certiorari was denied, at that point constitutional injury to BFI was caused and completed.

---

[6] *See Regan v. Board of Chiropractic,* 707 A.2d 891, 899 (Md. App. 1998) ("procedural due process . . . principles apply to any tribunal, be it judge [or] jury") (citing *Peters v. Kiff,* 407 U.S. 493, 501 (1972)); *In the Matter of JT v. State of Oklahoma,* 954 P.2d 174, 176 (Okla. Civ. App. 1997) ("Due process requires that life, liberty or property not be deprived by adjudication unless preceded by adequate notice, an opportunity for a hearing appropriate to the nature of the action, and the right to participate in a meaningful manner.").

Finally, by affirming an award of damages amounting to all future wages for a lifetime of employment with BFI, without affording BFI the due process of law to present evidence and defend against such an award on the very basis that the promise of fair treatment, whatever else may be fairly implied therein, did not contain an implied term of lifetime employment such as to justify an award of lifetime wages, the judicial branch of the state arbitrarily and unlawfully impaired the obligation of the contract of fair treatment which it found had modified the otherwise at-will employment contract between BFI and the plaintiff. This *post hoc* and retrospective judicial impairment of the modified contract is violative of BFI's rights secured under the federal and state constitutions. *US. Const. Art. I, Sec. 10; Colo. Const. Art. II, Sec. 11;. See*

*People v. Grenemyer,* 827 P.2d 603, 607 (Colo. App. 1992) ("judicial decisions may have the effect of ex post facto legislation and, thus, may be found to violate a defendant's right to due process of law"); *Aue v. Diesslin,* 798 P.2d 436, 438 (Colo. 1990). *See also Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813, 828 (1986) (recognizing as an important issue whether retrospective imposition of punitive damages under a new cause of action violates the contracts clause).

## CONCLUSION

For all of the foregoing reasons, BFI respectfully moves the Court to grant writ of certiorari to determine the precise elements of a claim for breach of implied-in-fact modifications of at-will employment contracts and the proofs required to the [sic] sustain the claim, including the term of employment which of necessity must first be found to be implied in the promise of fair treatment which elements and proofs are a prerequisite to imposition of contractual liability on BFI in order to avert violation of BFI's constitutional rights. As an interim form of relief, BFI respectfully moves the Court to order full briefing and argument, according to the rules of appellate procedure, on the constitutional claims raised by BFI herein.

DATED this ___ day of August 1998.

**McNamara Law Firm, P.C.**

BY: ____________________

John N. McNamara, Jr. #2471
McNamara Law Firm, P.C.
1669 17th Street, Suite 100
Denver, Colorado 80202
(303) 572-1660

Counsel for Petitioner-Movant

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing **PETITION FOR REHEARING AND MOTION FOR RELIEF** was served upon counsel for Thomas H. Decker by depositing the same in the United States mail, postage prepaid, this ___ day of August 1998:

**BRIDGERS & KASMIERSKI, L.L.C.**

Stefan Kazmierski, Esq.
6200 S. Syracuse Way, Suite 125
Englewood, Colorado 80111-4738
303-843-6234

Counsel for Respondent

____________________________________

## APPENDIX C

SUPREME COURT, STATE OF COLORADO
CASE NO. 98SC14
CERTIORARI TO THE COLORADO
COURT OF APPEALS, 93CA1427
DISTRICT COURT, ADAMS COUNTY, 92CV185

---

**ORDER OF COURT**

(Filed July 28, 1998)

---

BROWNING-FERRIS INDUSTRIES OF COLORADO, INC.,

Petitioner,

v.

THOMAS H. DECKER,

Respondent.

---

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the judgment of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, JULY 27, 1998.

[SEAL]

cc:

John N. McNamara, Jr.
1669 17th Street #100
Denver, CO 80202

Stefan Kazmierski
Bridgers & Kazmierski, L.L.C.
6200 S Syracuse Way, #125
Englewood, CO 80112-4738

Honorable John J. Vigil
Adams County District Court
Adams County Justice Center
1100 Judicial Center Drive
Brighton, CO 80601

Clerk of the District Court
Adams County District Court
Adams County Justice Center
1100 Judicial Center Drive
Brighton, CO 80601

Patrick H. Stanford, Clerk
Colorado Court of Appeals

## APPENDIX D

SUPREME COURT, STATE OF COLORADO

Case No. 98 SC 14

---

PETITION FOR CERTIORARI
by BROWNING-FERRIS INDUSTRIES
of COLORADO, INC.

---

BROWNING-FERRIS INDUSTRIES of COLORADO, INC.,
Petitioner,

v.

THOMAS H. DECKER,
Respondent.

---

Certiorari to the Colorado Court of Appeals
Case No. 93 CA 1427

Court of Appeals Division IV
Opinion by JUDGE CASEBOLT
Marquez, J., Concurring
Rothenberg, J., Dissenting

Remand to the Colorado Court of Appeals
in *Decker v. Browning-Ferris Industries of Colorado, Inc.*,
931 P.2d 436 (Colo. 1997)

---

January 9, 1998

Pursuant to C.A.R. 49 and 51, Browning-Ferris Industries of Colorado, Inc., ("BFI"), defendant-appellant below, petitioner here, respectfully submits its petition to this Court for a writ of certiorari to the Colorado Court of Appeals.

## ISSUE PRESENTED FOR REVIEW

Did the Court of Appeals err by refusing to address the elements of the new claim for breach of an implied-in-fact modification of an otherwise at-will employment contract and/or the proofs required to sustain the elements of such a claim, contrary to this Court's remand from *Thomas Decker v. Browning-Ferris Industries,* 931 P.2d 436 (Colo. 1997), as subsequently clarified by this Court's companion opinion in *Russell Decker v. Browning-Ferris Industries,* No. 96 SC 303 (1997 WL 672326) (as modified December 8, 1997)?

## OPINION BELOW

BFI seeks review of the opinion of the court of appeals, dated October 23, 1997, in *Thomas Decker v. Browning-Ferris Industries, ("Thomas Decker III") (Appendix A).* The opinion was authored by Judge Casebolt, with Judge Marquez concurring. Judge Rothenberg dissented. *Thomas Decker III* was not selected for publication.

## JURISDICTION

BFI timely filed its petition for rehearing in this case in the court of appeals on November 6, 1997. The Court of Appeals denied BFI's petition for rehearing on December 11, 1997, Judge Rothenberg dissenting. This Court has jurisdiction pursuant to Colo. Const., Art. VI, § 3 (1996), 6A C.R.S. § 13-4-108, and C.A.R. 49.

## STATEMENT OF THE CASE

As indicated by the cases cited in the issue presented for review, this Court has seen this employment case before. The facts of the case are set forth in this Court's first opinion in this litigation, *Thomas Decker v. Browning-Ferris Industries,* 931 P.2d 436 (Colo. 1997) ("Thomas Decker II") (Appendix B), which opinion reversed in part the court of appeals' first opinion in this case, *Thomas Decker v. Browning-Ferris Industries,* 903 P.2d 1150 (Colo. App. 1995) (*"Thomas Decker I"*) (Appendix C.) There is now a companion case, *Russell Decker v. Browning-Ferris Industries,* No. 96 SC 303 (1997 WL 672326) (as modified December 8, 1997) *("Russell Decker"),* the disposition of which was controlled by *Thomas Decker II* "because of the substantial similarities in facts, claims, jury instructions, and verdicts." 1997 WL 672326 at *2 (Appendix D).

Briefly, the plaintiff, Thomas Decker, was employed by BFI, beginning in 1985, as a trash removal truck driver, earning a wage of $7.75 per hour. *Thomas Decker II,* 931 P.2d at 438. In 1991, BFI "terminated Decker's employment for the stated reason that Decker worked too slowly. At this time Decker earned a wage of $11.50 per hour." *Id.* In 1992, Decker filed an amended complaint against BFI alleging a " 'breach of covenant of good faith and fair dealing' based on alleged express promises by BFI management that [he] would be treated fairly." *Id.*, at 439. As this Court found, "BFI expressly stipulated at trial that it had promised to treat Decker fairly." *Id.*

Following trial, "the jury found that BFI had terminated Decker in violation of both its progressive disciplinary policy and its express promise of fair treatment."

*Id.* "The Jury awarded Decker $600,000 in damages for lost income, $80,000 in damages for inconvenience and emotional stress, and an additional $680,000 in punitive damages on the claim of breach of covenant of good faith and fair dealing." *Id.* On appeal, the court of appeals affirmed the jury's finding of liability based on BFI's breach of contract, but reversed the award of damages, remanding to the trial court for retrial on damages because the court of appeals could not "discern under which theory [contract or tort] lost income was awarded." *Thomas Decker I*, 903 P.2d at 1158 (Appendix C).

This Court granted certiorari in *Thomas Decker I* to review two issues: "1. Whether the court of appeals erred in reversing the trial court's finding that the facts of the present case gave rise to a claim in tort for breach of the express covenant of good faith and fair dealing. 2. Whether the court of appeals erred in remanding this matter to the trial court for a new trial on damages after affirming the jury verdict on liability against BFI." *See Russell Decker*, 1997 WL 672326 at *4 n.1 (Appendix D). This Court affirmed the court of appeals "insofar as that court determined that no tort claim for breach of an express covenant of good faith and fair dealing exists in the employment context in Colorado," but reversed the court of appeals' judgment insofar as it "set aside the jury verdict[] awarding Decker . . . economic damages." *Thomas Decker II*, 931 P.2d at 448.

However, while affirming "that BFI is liable to Decker for economic damages," this Court remanded the case to the court of appeals "for consideration of BFI's arguments challenging the amount of the jury's award of economic damages." *Id.* This Court noted that "it is clear that the jury's award of $600,000 in economic damages includes **a substantial amount for front pay, or lost future wages**." *Id.* (emphasis added). On remand, the court of appeals affirmed the entire $600,000 award for lost income, including the substantial portion thereof consisting of front pay or lost future wages. *Thomas Decker III* (Appendix A). BFI respectfully submits, for the reasons and arguments presented below, that the court of appeals erred on remand.

## SUMMARY OF ARGUMENT

This Court should grant a writ of certiorari to review *Thomas Decker III* in order to complete the jurisprudence on the claim for breach of an implied-in-fact modification of an otherwise at-will employment relationship first recognized in *Thomas Decker II*. As this Court expressly noted in the recent companion opinion to this case, *Russell Decker*, the elements of, and the necessary proofs to sustain, the new claim have not been addressed much less established by this nor any other Colorado court.

Below, the majority opinion of the court of appeals ignored BFI's substantive arguments on the element and proof as to the measure or fact of damages for such a claim and approached the case on remand as nothing more than a review of the expert testimony at trial supporting the $600,000 award of front pay or lost future wages. The court of appeals thus implicitly, but erroneously, found that the promise to treat Decker fairly modified the otherwise at-will employment contract between Decker and BFI by creating a life-time term of employment, with the $600,000 award in damages for termination being, in effect, "tantamount to a life-time annuity." *See Thomas Decker III* (Rothenberg, J., dissenting) (Appendix A at 11). Thus, the court of appeals decided the case on remand contrary to this Court's *Decker* opinions.

## REASONS FOR GRANTING THE WRIT

First, the court of appeals disregarded BFI's express arguments concerning the proper measure or fact of damage, which arguments were presented for the second time to the court of appeals on remand in this case. BFI respectfully submits that fundamental fairness dictates that its substantive contentions challenging the $600,000 award in damages, the bulk of which constitutes damages for front pay and lost future wages, be addressed and determined by at least one appellate tribunal.

To be sure, the court of appeals did not have the benefit of this Court's more recent opinion in the companion case, *Russell Decker* (Appendix D), as modified on December 8, 1997. There, this Court expressly clarified not only what it was not deciding, but also what it did not decide in *Thomas Decker II*. Unfortunately, the timing of the court of appeals's decision in this case, *Thomas Decker III*, and the timing of this Court's modification of *Russell Decker*, did now allow BFI an opportunity to present *Russell Decker*, **as modified**, to the court of appeals in this case, either on petition for rehearing or obviously in briefing on the merits before the court of appeals.

*Russell Decker*, however, expressly acknowledges why certiorari here is warranted. Denying BFI's petition for rehearing in *Russell Decker*, this Court modified that opinion by adding:

> Here, as in *Thomas Decker [II]*, we accept the finding of the jury of a breach of an express contractual obligation **without addressing the elements of such a claim** or the proof necessary to sustain the claim. These issues are not before us and were not before us in *Thomas Decker [II]*.

*Russell Decker*, 1997 WL 672326 at *3 (emphasis added) (for the "redlined pages" indicating the foregoing addition by this Court to *Russell Decker, see* Appendix E, page 10).

Of equal significance is the following deletion by this Court upon denial of rehearing in *Russell Decker:*

> That is, if an employer makes an express promise to deal with an employee in a fair manner, and the employer later breaks its promise, the employee has a cause of action for breach of an express promise of fair and equitable treatment.

*See* Appendix E, page 6. While recognizing that deletions in opinions are not part of the Court's jurisprudence, BFI respectfully interprets the foregoing deletion as confirmation that the "cause of action" recognized in the *Decker* opinions for breach of the promise of fair treatment is not an ordinary breach of contract claim, the elements and proofs of which are already long-established in Colorado.

Because the elements of a claim for breach of a promise to be treated fairly in an otherwise at-will employment relation, along with the proofs required to sustain such a claim, were unaddressed by this Court, and because no other Colorado court, either trial or appellate, has determined those elements and proofs, BFI respectfully asks how it can be a $600,000 judgment debtor in this case on a claim the elements and necessary proofs of which have never been addressed, much less established, by any court in Colorado?

This Court further clarified its *Decker* opinions by emphasizing that while it "recognize[d] that the terms and conditions of an employment contract may be modified, neither in *Thomas Decker [II]* nor here *[Russell Decker]* do we abrogate Colorado's at-will employment doctrine. In Colorado, employment is generally at-will and an employer may terminate an employee " 'without cause and without notice.' " *See* Appendix E, page 7 (citing *Crawford Rehabilitation Services v. Weissman*, 938 P.2d 540, 546 (Colo. 1997)).

Thus, from a fair reading of this Court's opinion in *Russell Decker*, and in view of the exclusive focus by the majority below on the mere sufficiency of the expert testimony on the plaintiff's life-time future wage losses, it is difficult not to conclude that the central *legal* question at the core of this Court's remand remains unaddressed and unanswered:

> How, precisely, does a promise simply to treat an employee fairly modify the terms and conditions of a theretofore at-will employment contract?

In other words, what new and definite, future term of employment is implied or contained in the promise to treat an employee fairly, such that *contract damages* for lost future wages resulting from a breach of that promise can be justly determined by a court or jury? As to the majority opinion below, how can the court of appeals properly assess the sufficiency of the evidence on damages when the elements of the claim and the quality and quantum of proof required to sustain the claim have not been established by any court?

Given this Court's *Decker* decisions, BFI accepts, as it must, the "finding of the jury of a breach of an express contractual obligation." BFI did not question that finding below, nor does it question that finding here. Rather, BFI presented to the court of appeals express briefing and argument on the very issues which this Court acknowledges it did not address, either in *Russell Decker* or in *Thomas Decker II*. In its opening brief in the court of appeals, both in *Thomas Decker I* and subsequently on remand from this Court's opinion in *Thomas Decker II*, this case, BFI argued that the $600,000 award was not only "contrary to the evidence," but also "contrary to law." *See* Defendant-Appellant's Opening Brief (in court of appeals) at 23, 24. BFI also argued that the wage award should be set aside because "it is based upon speculative evidence and thus violates the 'rule of certainty.' " *Id.*, at 24. The rule of certainty, BFI expressly argued below:

> often arises in contract cases involving lost profits, but **the rule also applies to other claims for future damages**. *Pomeranz v. McDonald's Corp.*, 843 P.2d 1378 (Colo. 1993).
>
> In a breach of contract action involving future damages, a plaintiff is required to prove both the **fact of the injury** and the amount of the loss. Because "future" damages are often difficult to prove, the *Pomeranz* court announced a standard that strikes an appropriate balance.

> The test requires: 1) **proof of the fact that damages will accrue in the future**, and 2) sufficient admissible evidence which would enable the trier of fact to compute a fair approximation of the loss.
>
> Here, there was no proof that Mr. Decker would accrue damages in the future. **In order to satisfy the first prong of the *Pomeranz* test, Decker would have to prove that he will never find suitable substitute employment.**

*Id.*, at 28-29 (emphasis added). The issue of the fact of damage is a legal issue, and mere presentation (over BFI's objection) of expert testimony as to the wages an otherwise healthy, 30-something-year-old employee would or could have earned in a "life-time" of employment with BFI should not be allowed as a proxy for judicial determination of that issue. In an employment case, such as this, a jury award which "includes a substantial amount for front pay, or lost future wages," *Thomas Decker II*, 931 P.2d at 448, necessarily implicates the *fact* of damage, not simply the *amount* of damages. The decision of the majority below, however, ignored the issue, leaving BFI with a hollow remand from this Court.

The majority opinion below not only overlooked BFI's legal points and arguments but misconstrued BFI's argument that "the damage award may not stand because it is based upon **speculative evidence** and thus violates the 'rule of certainty.' " *Thomas Decker III*, Appendix A at 6. The majority below correctly remarked that the rule "applies only to situations in which the fact of damage is uncertain," but then erroneously concluded that BFI's argument does not refer to the fact of damage but only to the "amount of damages." *Id.* But the above quoted arguments from BFI's Opening Brief in the court of appeals belie that contention. Those arguments illustrate BFI's stated position below that the jury's $600,000 award for lost future wages may not stand because "speculative evidence" can no more establish the *fact of damage* than it can establish the *amount of damage*. In other words, expert testimony predicated entirely on life-time losses of future wages is per se speculative when no appellate court has yet to establish that a life-time term of employment can be implied by the promise of fair treatment in an at-will employment context.

Hence, the majority below erred by reducing BFI's argument to a mere challenge to "calculating damages" and by ignoring BFI's substantive challenges to the award of $600,000 in lost future wages, which challenges, based on the authority of *Pomeranz* and *Department of Health v. Donahue*, 690 P.2d 243 (Colo. 1984), incontestably highlighted the complete absence of any proof by Decker of the term of future employment, which term, BFI submits, is necessary to establish and sustain any claim for damages for lost future wages.

Overlooking and/or misconstruing BFI's argument that the *Pomeranz* test requires **proof of the fact that damages will accrue in the future**, the majority below not surprisingly ignored the following rule as to the fact or measure of damages established by this Court in *Donahue:*

> From an economic standpoint, this remedy restores Donahue to the position she would have been in if the flawed predisciplinary meeting had never occurred and she had simply been

> dismissed at the conclusion of her probationary term for the same reason that occasioned her discharge in this case, unsatisfactory job performance.

690 P.2d at 250. The majority below thus ignored arguments based on clear precedential adumbrations as to the measure and fact of damages in cases of a breach of a promise of fair and equitable treatment in an otherwise at-will employment relationship. *See* C.A.R. 49(a)(2).

BFI also presented the issue of the accrual of future damages in terms of the failure to mitigate future damages, as opposed to mitigation of damages from the point of the breach of fair treatment up to the time of trial. BFI argued below that the issue of failure to mitigate included not only pre-trial mitigation of damages, but more importantly, included the problem of **future mitigation** of damages for alleged future wage loss. If proof of future mitigation is impossible, then that only shows why damages for front pay and lost future wages in contract cases must be bounded by a rule of reason. The majority opinion below failed to establish any limits of "reasonable time" for future lost wages and benefits and failed to articulate any guidelines for what would constitute competent and relevant evidence supporting this Court's recognition of a cause of action for breach of the promise of fair and equitable treatment in *Thomas Decker II.*

In other words, no rules were established by the majority opinion below for what can be termed either the problem of accrual of future wage losses or the problem of mitigation of future wage losses. Courts in other jurisdictions have recognized the problems and have established such rules, recognizing that implied-in-fact modifications of otherwise at-will employment contracts do not give rise to life-time terms of employment and thus cannot form a new contract upon which a life-time of wages can be awarded. *See e.g, Torosyan v. Boehringer Ingelheim Pharmaceuticals, Inc.*, 662 A.2d 89, 106 (Conn. 1995) ("Whatever the origins of damages for future lost wages, however, we are persuaded that such damages can be awarded in actions for breach of an implied contract of employment, **as long as they are limited to a reasonable time and are supported by the evidence.**") (emphasis added).

Given the new cause of action for breach of a promise of fair and equitable treatment established by this Court in *Thomas Decker II*, BFI urges this Court to grant certiorari in order to establish the special legal rules needed to guide litigants, courts and juries, which rules must include rules for pleading, trying and proving the *terms*, expressed or implied, in the promise of fair and equitable treatment, which terms may or may not include a *term of future employment*. Such rules must be developed and applied before damages can be accordingly assessed by a jury. As this Court's *Decker* opinions repeatedly emphasize, this is a contract case, not a tort case, and thus at the very least the jury must be instructed to first find that a (more or less) certain term of future employment was implied in the promise of fair treatment before it can assess and award appropriate damages for the loss of the wages for that term of future employment. *See Soderlun v. Public Service Co.*, ___ P.2d ___, 1997 WL 45279 at *3 (Colo. App. February 6, 1997) (No. 95 CA 0458) ("The supreme court has not purported to create any **special rules** to deal with employee claims of contract breaches."), *cert. denied* (October 20, 1997) (emphasis added).

Here, the jury did not determine, nor has this Court nor any Colorado court, determined the terms of BFI's promise of fair and equitable treatment relating to future employment. The rule of certainty, as it applies to the fact of damage, simply recognizes that a plaintiff must plead and prove, and a jury must determine on that evidence, the *terms of the contract* upon which damages for future wage loss are claimed and assessed. *Soderlun,* at *3 ("Moreover, quite irrespective of the nature of the promise, the common law generally requires that, to form the basis of an enforceable contract, a promise must be 'reasonably certain'; that is, the promise must be sufficiently specific to 'provide a basis for determining the existence of a breach and for giving an appropriate remedy.' ") (A promise must "be sufficiently specific so that the judiciary can understand the obligation assumed and enforce the promise according to its terms"). BFI respectfully requests this Court to fashion such special rules, building on *Pomeranz* and *Donahue,* to govern employee claims of breaches of the promise of fair and equitable treatment which modify at-will employment contracts.

Certiorari is thus the appropriate vehicle to correct the court of appeals' failure to address both the elements of the claim for breach of the promise to be treated fairly, which promise may modify an at-will employment relationship, and the proofs required to sustain the claim. Certiorari on the issue presented would, for the first time in this litigation, give BFI an opportunity to be heard on the issues involved in establishing the elements of the newly recognized claim for breach of the promise of fair treatment.

Finally, a clear indication that the majority below erred on remand of this **contract case** is its exclusive reliance on tort cases for its standard of review and thus its decision not to disturb the jury's award of $600,000, despite this Court's repeated cautions that the claim it recognizes is a contract claim and not a tort claim. *See Thomas Decker III* Appendix A at 1-3, citing *Keohane v. Stewart,* 882 P.2d 1293 (Colo. 1994) (damages for tort of defamation); *Jackson v. Moore,* 883 P.2d 622 (Colo. App. 1994) (wage-loss award for negligence causing employment-related injury); *Lee's Mobile Wash v. Campbell,* 853 P.2d 1140 (Colo. 1993) (damages in tort for rear-end collision); *Cottingham v. Star Bus Line,* 152 Colo. 188, 381 P.2d 25 (1963) (damages for tort resulting from auto collision); and *Good v. A.B. Chance Co.,* 39 Colo. App. 70, 565 P.2d 217 (1977) (damages for tort of wrongful death).

Certiorari is thus the appropriate vehicle to correct the court of appeals' failure to address both the elements of the claim for breach of the promise to be treated fairly, which promise may modify an at-will employment relationship, and the proofs required to sustain the claim. Certiorari on the issue presented would, for the first time in this litigation, give BFI an opportunity to be heard on the issues involved in establishing the elements of the newly recognized contract claim for breach of the promise of fair treatment and the proofs required to sustain the claim.

## CONCLUSION

For all of the foregoing reasons, BFI respectfully moves the Court to grant writ of certiorari to determine the precise elements of a claim for breach of implied-in-fact modifications of at-will employment contracts and the proofs required to sustain the claim, which elements and proofs are necessary for a just and reasonable resolution of this litigation.

DATED this 9th day of January 1998.

**McNamara Law Firm, P.C.**

BY: /s/ John N. McNamara, Jr.
John N. NcNamara, Jr. #2471
McNamara Law Firm, P.C.
1669 17th Street, Suite 100
Denver, Colorado 80202
(303) 572-1660

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing **PETITION FOR CERTIORARI** was served upon counsel for Thomas H. Decker by depositing the same in the United States mail, postage prepaid, this ___ day of January 1998:

**BRIDGERS & KASMIERSKI, L.L.C.**

Stefan Kazmierski, Esq.
6200 S. Syracuse Way, Suite 125
Englewood, Colorado 80111-4738
(303) 843-6234

Counsel for Plaintiff-Appellee

/s/ Illegible

## APPENDIX E

---

COLORADO COURT OF APPEALS October 23, 1997
No. 93CA1427 NOT SELECTED FOR PUBLICATION

---

Thomas H. Decker,

Plaintiff-Appellee,

v.

Browning-Ferris Industries of Colorado, Inc.,

Defendant-Appellant.

---

Appeal from the District Court of Adams County
Honorable John J. Vigil, Judge
No. 92CV185

Division IV
Opinion by
JUDGE CASEBOLT
Marquez, J. concurs.
Rothenberg, J., dissents

VERDICTS REINSTATED AND
JUDGMENT AFFIRMED
IN PART

---

Stefan Kazmierski, Englewood, Colorado, for Plaintiff-Appellee

John N. McNamara, P.C., John N. McNamara, Denver, Colorado; Baker & Hostetler, James A. Clark, Kathryn A. Elzi, Denver, Colorado, for Defendant-Appellant

In this wrongful termination of employment action, defendant, Browning-Ferris Industries of Colorado, Inc., (BFI) appeals the judgment entered upon a jury verdict awarding damages to plaintiff, Thomas H. Decker. In a previous opinion, *Decker v. Browning-Ferris Industries of Colorado, Inc.*, 903 P.2d 1150 (Colo. App. 1995), we set aside the jury verdict in favor of Decker for $600,000 in economic damages, and remanded with directions to grant a new trial on damages. On certiorari review, the supreme court in *Decker v. Browning-Ferris Industries of Colorado, Inc.*, 931 P.2d 436 (Colo. 1997), affirmed our judgment in part, reversed it in part, and remanded with directions that we reinstate the jury verdicts awarding Decker economic and non-economic damages. Also, because we did not address BFI's arguments challenging the amount of the jury's award, the supreme court remanded for our consideration of that issue. Upon that reconsideration, we affirm that award.

## I.

BFI asserts that the jury's award of lost wages to Decker in the amount of $600,000 is unsupported by the evidence. We disagree.

The amount of damages is within the sole province of the jury, and an award will not be disturbed unless it is grossly and manifestly inadequate or excessive and completely unsupported by the record. *Keohane v. Stewart*, 882 P.2d 1293 (Colo. 1994); *Jackson v. Moore*, 883 P.2d 622 (Colo. App. 1994).

A reviewing court should not disregard a jury's verdict that has support in the evidence in favor of its own view of the evidence. Rather, the court's duty is to reconcile the verdict with the evidence if at all possible. *See Lee's Mobile Wash v. Campbell*, 853 P.2d 1140 (Colo. 1993).

Further, the weight to be given to opinion evidence is for the jury, and the opinion of experts, even when unanimous and uncontroverted, is not necessarily conclusive upon the jury. *See Cottingham v. Star Bus Line,* 152 Colo. 188, 381 P.2d 25 (1963).

Here, an economist testified as an expert witness for Decker concerning the present value of his future wage loss. He testified that he considered Decker's salary and benefit level at BFI at the time he was fired and the fact that Decker earned approximately $13,000 a year in overtime.

The witness stated that a figure between $1,001,236 and $1,389, 541 represented the present value of Decker's future earnings had he remained at BFI. He then concluded that the present value of Decker's wage loss stemming from his discharge was between $52,194 and $440,716. The $52,194 figure represented the total loss if Decker would not have continued working overtime at BFI, while the $440,716 figure assumed that Decker would have worked the same amount of overtime at BFI until age 65. Both figures, however, assumed that Decker would find replacement employment and that his replacement wage would equal the average national wage for high school graduates.

The economist's opinion was that Decker's total wage loss could amount to "something around $400,000," but that a total loss of between $200,000 and $350,000 was his best estimate.

As noted, the expert's wage loss calculations were based upon Decker – a high school graduate – securing a job within five months after the trial earning a wage equal to the average national wage for high school graduates. The expert, however, testified that wages for high school graduates in western Colorado, where Decker previously worked and still lived, were approximately 15% to 20% lower than the national averages upon which his computations were based. Thus, Decker's wage loss would be greater than the economist's projections should he either not secure a job within five months of the trial, or not be able to find work paying wages equivalent to the average national wage for high school graduates.

Based upon this evidence, we cannot say that the jury's award of $600,000 in lost wages is completely unsupported by the record. *See Keohane v. Stewart, supra.*

Additionally, in *Good v. A. B. Chance Co.*, 39 Colo. App. 70, 565 P.2d 217 (1977) a division of this court concluded that a jury award was not manifestly and grossly excessive simply because it exceeded the amount of pecuniary loss projected by an economist. The court noted that the economist's testimony demonstrated that his figures were conservative, and the jury was not required to adhere strictly to the expert's testimony.

Here, the economist's testimony supported a lost wage award higher than the maximum $440,716 figure provided. Thus, we similarly conclude that, because the jury was not bound to adhere strictly to the economist's projections, the fact that the jury award was in excess of the amount testified to by the economist does not make it grossly and manifestly excessive.

## II.

BFI asserts that the jury's award of $600,000 in lost wages must be reversed because it is contrary to law and reflects the application of an improper measure of damages. We disagree.

## A.

BFI first argues that the award of "a lifetime of future wages – with no deduction for what [Decker] will earn for the rest of his work life" – is not allowed in wrongful termination cases. Because we determine that Decker's expert did deduct Decker's future earnings in making his projections, we reject BFI's argument.

Here, the economist reviewed the salary, benefits, and overtime pay that Decker earned at BFI, and projected what he would have earned had he remained at BFI. The economist then arrived at his lost wage projections by subtracting from that amount the compensation that a person with Decker's educational background and experience could expect to earn in the future from other employment.

Thus, the economist's wage loss figures did take into account the amount that Decker could earn for the rest of his work life.

Further, the mere fact that the jury awarded a sum of $600,000 in lost wages does not mean that it awarded a lifetime of future wages with no reduction for Decker's future earning potential.

First, a portion of that award was for wage loss occurring before trial. Second, the only information available to the jury as to Decker's lifetime wages was the economist's data that a figure between $1,001,236 and

$1,389,541 represented the present value of Decker's future earnings had he remained at BFI.

Thus, because the evidence fails to establish that the jury's award of $600,000 is equivalent to a lifetime future wage award, we reject BFI's contention that the award is prohibited as a matter of law.

BFI, however, relies on *Department of Health v. Donahue*, 690 P.2d 243 (Colo. 1984) for the proposition that, because damages must fit the wrong, and because the economic wrong sustained by Decker was vastly disproportionate to the $600,000 "windfall" provided by the jury, we must reject the jury's award. We find BFI's reliance upon *Donahue* to be misplaced.

First, BFI's claim that the jury award was "vastly disproportionate" does not support its claim that the award is prohibited as a matter of law, but rather goes to the issue discussed above concerning whether the award was excessive and unsupported by evidence.

Second, in *Donahue* it was necessary for the supreme court to determine damages because such had not been previously assessed. Here, in contrast, it was the jury's responsibility to assess damages, and our review of that decision is limited to whether the award is grossly or manifestly excessive and unsupported by the evidence. *See Keohane v. Stewart, supra; Jackson v. Moore, supra.*

## B.

BFI next argues that the economic damage award may not stand because it is based upon speculative evidence and thus violates the "rule of certainty." Assuming *arguendo,* that the rule of-certainty applies to a lost wage claim, we disagree.

The rule of certainty requires that a plaintiff show the fact of damage along with substantial evidence that, together with reasonable inferences to be drawn therefrom, provides a reasonable basis for computation of the damage. *Pomeranz v. McDonald's Corp.,* 843 P.2d 1378 (Colo. 1993).

This rule, however, applies only to situations in which the fact of damage is uncertain, not where the amount of damages is uncertain. A plaintiff need not present such facts as would formulate a positive and certain basis for calculating damages so long as there is some evidence sufficient to allow a reasonable estimate of the damages. *Cooper v. Hollis,* 42 Colo. App. 505, 600 P.2d 109 (1979).

Further, when a defendant's conduct has rendered difficult the assessment of damages, the defendant cannot escape liability simply because of such difficulty in ascertaining exact damages. *American Industrial Leasing Co. v. Costello,* 160 Colo. 588, 418 P.2d 881 (1966).

Here, the economist testified that Decker suffered wage loss before trial in the amount of $77,000 and would suffer future wage loss stemming from BFI's wrongful termination. The economist also provided evidence of the wage, benefits, and overtime pay that Decker had earned at BFI, and compared the total compensation to that from other jobs potentially available to Decker. The economist then projected wage loss based on differences between the rates of compensation, factoring in historical and national statistical averages for individuals with Decker's educational background and experience.

We conclude that this evidence was sufficient to support the fact of and amount of damages, and was also sufficient to allow a reasonable estimate of the damages. *See Cooper v. Hollis, supra.*

### C.

Finally, we also reject BFI's contention that the award must be reversed because it ignores Decker's failure to mitigate. A party injured by a breach of contract has a duty to make reasonable efforts to mitigate the damages sustained. *Tull v. Gundersons, Inc.,* 709 P.2d 940 (Colo. 1985).

Here, the special verdict form specifically requested the jury to consider whether Decker "failed to mitigate his damages by failing to attempt to find other work." The jury answered that Decker had not failed to mitigate his damages, and we will not disturb that finding on review. *See Miller v. Mountain Valley Ambulance Service, Inc.,* 694 P.2d 362 (Colo. App. 1984) (appellate court will not replace the jury's findings resolving conflicting evidence with its own impressions or conclusions).

The jury verdicts awarding damages to Decker in the amount of $600,000 for economic damages and $80,000 in non-economic damages is reinstated, and the portion of the judgment entered on those verdicts is affirmed.

JUDGE MARQUEZ concurs.

JUDGE ROTHENBERG dissents.

JUDGE ROTHENBERG dissenting.

Because I conclude that the jury's award of lost wages to plaintiff, Thomas H. Decker, is unsupported by the evidence, I would reverse the judgment and remand for a new trial on economic damages. Therefore, I respectfully dissent.

Damages arising from breach of contract is not designed to punish for the breach, but rather, to compensate the promisee for losses sustained as a result of the breach. *See Decker v. Browning-Ferris Industries,* 931 P.2d 436 (Colo. 1997); *Mortgage Finance, Inc. v. Podleski,* 742 P.2d 900 (Colo. 1987).

Here, looking at the evidence in the light most favorable to Decker, I find nothing in the record to support economic damages of $600,000.

At the time of his discharge, Decker was a thirty-two-year old able-bodied man who had been working for the previous five years as a trash removal truck driver. Decker's expert witness, an economist, testified that:

> The upperend (sic) of the range [of lost wages] is probably something around $400,000 . . . with overtime and . . . probably, I'd say, not quite as high as $400,000, maybe $200,000 to $350,000.

In calculating the economic loss to Decker, the expert specifically took into account and discounted for the fact that wages in western Colorado were below the national average. He stated that:

> Wages are 15, maybe 20 percent lower in western Colorado than in the U.S. So I'm inclined to discount those figures also.

The fact that the expert specifically discounted his figures and described $400,000 as "the upper end of the range" with the correct amount "maybe $200,000 to $350,000" distinguishes these facts markedly from those in *Good v. A.B. Chance Co.*, 39 Colo. App. 70, 565 P.2d 217 (1977). There, plaintiffs brought a wrongful death action seeking recovery for the death of an electrical lineman. In that action, the jury award exceeded the expert's estimate by $44,000, and noting that the expert had testified that his figures were conservative, the division rejected a contention that the verdict was manifestly excessive. The circumstances in that case are far different from those here. For example, here, Decker's counsel stated in closing argument:

> [The economist] testified that based on his data . . . he believes that Mr. Decker's lost wages in his lifetime – because he's been fired by BFI – is in the range of 200- and $350,000. And you know that's true, ladies and gentlemen.
>
> . . . .
>
> [The economist] said that if you gave him that money, the 200- to $300,00 [sic], he would have to invest that just to duplicate what he would have earned had he remained at BFI. *That's all he's asking for.* (emphasis added)

This argument is consistent with the evidence of economic loss and I find it irreconcilable with the jury's award of essentially twice the amount requested.

Plaintiff is entitled to be fairly compensated for his actual economic loss without punishing defendant. Here, however, the jury awarded him what is tantamount to a lifetime annuity far in excess of the highest dollar amount the evidence would justify. Therefore, I would reverse the judgment and remand for new trial on economic damages.

# APPENDIX F

## COURT OF APPEALS, STATE OF COLORADO

**Case No. 93 CA 1427**

---

## DEFENDANT-APPELLANT'S PETITION FOR REHEARING

---

**THOMAS H. DECKER,**

**Plaintiff-Appellee,**

v. (Filed Nov. 6, 1997)

**BROWNING-FERRIS INDUSTRIES of COLORADO, INC.,**

**Defendant-Appellant.**

---

Defendant-Appellant, Browning-Ferris Industries of Colorado, Inc. ("BFI"), by and through its undersigned attorneys, petitions this Court, pursuant to C.A.R. 40, to rehear this matter. BFI respectfully submits that the majority opinion overlooks BFI's substantive arguments on the proper measure or fact of damages for the new cause of action recognized by the supreme court. BFI also submits that the majority opinion contains *flawed reasoning* and *internal inconsistencies* as shown below.

1. On October 23, 1997, this Court issued its opinion in this matter reinstating the verdicts and affirming the judgment in part. **Decker v. Browning-Ferris Industries of Colorado, Inc.,** Colo. App., No. 93 CA 1427 (October 23, 1997) ("Not Selected For Publication") ("**Decker III**").

The opinion was by Judge Casebolt, with Judge Marquez concurring. Judge Rothenberg dissented.

2. **Decker III** is this Court's opinion upon remand from the Colorado Supreme Court's opinion in **Decker v. Browning-Ferris Industries of Colorado, Inc.**, 931 P.2d 436 (Colo. 1997) ("**Decker II**").

3. **Decker II** in turn was a review on certiorari of this Court's opinion in **Decker v. Browning-Ferris Industries of Colorado, Inc.**, 903 P.2d 1150 (Colo. App. 1995) ("**Decker I**"). The panel of this Court which decided **Decker I** also decided **Decker III**.

4. BFI first submits that the Court's opinion, including both the majority and the dissent, fails to consider BFI's substantive arguments on the issue of the *fact of future damages*. The cause of the Court's failure may be an apparent miscue from the supreme court on remand. While the supreme court remanded the case to consider the award of "back pay, loss of future pay and loss of benefits," **Thomas Decker II** 931 P.2d at 447, and while the supreme court noted that Decker "earned a wage of $11.50 per hour" and that *"it is clear that the jury's award of $600,000 in economic damages includes a substantial amount for front pay, or lost future wages,"* **Id.** at 448 (emphasis added), the supreme court also stated:

> while we affirm the jury's finding that BFI is liable to Decker for economic damages, we remand Decker's case to the court of appeals for consideration of BFI's arguments challenging the *amount* of the jury's award of economic damages in that case.

931 P.2d at 448 (italics added). With this apparently innocent remark, the supreme court overlooked a crucial argument by BFI on a central issue in this case: the *fact* of future damages for a breach of the promise of fair and equitable treatment in an otherwise at-will employment relation, not simply the *amount* of future damages in such a case.

5. In its Opening Brief to this Court, BFI argued that the $600,000 award was not only "contrary to the evidence," but also "contrary to law." **Defendant-Appellant's Opening Brief at 23, 24.** BFI also argued that the wage award should be set aside because "it is based upon speculative evidence and thus violates the 'rule of certainty.' " **Id. at 24.** The rule of certainty, BFI argued to this Court:

> often arises in contract cases involving lost profits, but the rule also applies to other claims for future damages. **Pomeranz v. McDonald's Corp.,** 843 P.2d 1378 (Colo. 1993).
>
> In a breach of contract action involving future damages, a plaintiff is required to prove both the fact of the injury and the amount of the loss. Because "future" damages are often difficult to prove, the **Pomeranz** court announced a standard that strikes an appropriate balance. The test requires: 1) *proof of the fact that damages will accrue in the future,* and 2) sufficient admissible evidence which would enable the trier of fact to compute a fair approximation of the loss.
>
> Here, *there was no proof that Mr. Decker would accrue damages in the future.* In order to satisfy the first prong of the Pomeranz test, Decker

> would have to prove that he will never find suitable substitute employment.

**Id. at 28-29 (emphasis added).** Hence, BFI would urge the court to rehear this case because an award which "includes a substantial amount for front pay, or lost future wages," **Thomas Decker II,** 931 P.2d at 448, necessarily implicates the *fact* of damage, not just the *amount* of damages.

6. The majority overlooks these legal points and arguments and misconstrues BFI's argument that "the damage award may not stand because it is based upon speculative evidence and thus violates the 'rule of certainty.' " Slip Op. at 6. The majority correctly remarks that the rule "applies only to situations in which the fact of damage is uncertain," but then erroneously concludes that BFI's argument does not refer to the fact of damage but only to the "amount of damages." Slip Op. at 6. BFI respectfully submits, as demonstrated by the above cited arguments in its Opening Brief to this Court, that its argument that the $600,000 award may not stand because based on "speculative evidence" is and was an argument that such speculative evidence can no more establish the *fact of damage* than it can establish the *amount of damage.* Hence, the majority errs by reducing BFI's argument to a mere challenge to "calculating damages"and ignores BFI's substantive challenges, based on **Pomeranz and Department of Health v. Donahue,** 690 P.2d 243 (Colo. 1984), to the fact of future employment and future losses justifying an award of $600,000.

7. Overlooking and/or misconstruing BFI's argument that the **Pomeranz** test requires *proof of the fact that*

*damages will accrue in the future,* the majority not surprisingly ignores the following rule as to the fact or measure of damages established in **Donahue:**

> From an economic standpoint, this remedy restores Donahue to the position she would have been in if the flawed predisciplinary meeting had never occurred and she had simply been dismissed at the conclusion of her probationary term for the same reason that occasioned her discharge in this case, unsatisfactory job performance.

690 P.2d at 250. The Court misapprehends the role **Donahue** must play in this case. Hence, the opinion as written ignores arguments based on clear precedential directives on the measure and fact of damages in cases of a breach of a promise of fair and equitable treatment in an otherwise at-will employment relationship.

8. As further indication that the majority misapprehends BFI's substantive arguments as to the *fact* of Decker's future damages, the majority opinion fails properly to address the issue on the failure to mitigate. BFI argued in the supreme court and here that the issue of failure to mitigate included not only pre-trial mitigation of damages, but more importantly, included the problem and failure of proof of future mitigation of damages for future wage loss.

9. Because the majority fails to correctly apprehend BFI's substantive challenges, BFI respectfully submits that the majority opinion fails to establish any limits of "reasonable time" for future lost wages and benefits and fails to articulate any guidelines for what would constitute competent and relevant evidence supporting the

supreme court's new cause of action for breach of the promise of fair and equitable treatment established in **Thomas Decker II.** In other words, no rules were established in the majority opinion for what can be termed the problem of "accrual of future wage losses." **See and compare Fair v. Red Lion Inn,** 943 P.2d 431, 442 (Colo. 1997) ("The result of such failure to mitigate damages is a loss of any claim to damages based upon the accrual of back pay from the date of the reinstatement offer.") **See e.g., Torosyan v. Boehringer Ingelheim Pharmaceuticals, Inc.,** 662 A.2d 89, 106 (Conn. 1995) ("Whatever the origins of damages for future lost wages, however, we are persuaded that such damages can be awarded in actions for breach of an implied contract of employment, *as long as they are limited to a reasonable time and are supported by the evidence.*") (italics added).

10. The legal issue, implicitly argued by BFI both here and in the supreme court, but ignored by this Court and the supreme court, is as follows:

> In cases of the breach of a promise of fair and equitable treatment in an otherwise at-will employment relation, can the jury, by an award of damages which "includes a substantial amount for front pay, or lost future wages," thereby implicitly find that one or more of the *terms of the contract* of fair and equitable treatment is a promise of indefinite future employment?

While BFI respectfully states that the answer must be "no," the majority opinion implicitly answers "yes" and thus the case should be reheard.

11. Given the new cause of action for breach of a promise of fair and equitable treatment established by the supreme court in **Decker II,** this Court should rehear this matter in order to establish the special legal rules to guide litigants, courts and juries, which rules must include rules for pleading, trying and proving the *terms* of the contract of fair and equitable treatment *relating to future employment*. Such rules must be developed and applied *before* damages can be accordingly assessed by a jury. This is a contract case, not a tort case, and thus the jury must first find the terms of the contract upon which it assesses and awards appropriate damages for loss of future wages. **See Soderlun v. Public Service Co.,** ___ P.2d ___, 1997 WL 45279 at *3 (Colo. App. February 6, 1997) (No. 95 CA 0458) ("The supreme court has not purported to create any *special rules* to deal with employee claims of contract breaches.), **cert. denied** (October 20, 1997) (italics added).

12. Here, the jury did not determine, nor has this court determined, the terms of BFI's promise of fair and equitable treatment relating to future employment. The rule of certainty, as it applies to the fact of damage, simply recognizes that a plaintiff must plead and prove, and a jury must determine on that evidence, the *terms of the contract* upon which damages for future wage loss are claimed and assessed. **See Soderlun**, at *3 ("Moreover, quite irrespective of the nature of the promise, the common law generally requires that, to form the basis of an enforceable contract, a promise must be 'reasonably certain'; that is, the promise must be sufficiently specific to 'provide a basis for determining the existence of a breach and for giving an appropriate remedy.' ") (A promise

must "be sufficiently specific so that the judiciary can understand the obligation assumed and enforce the promise according to its terms."). Since damages for lost future pay necessarily implicates a term of future employment, the court must fashion a special rule, using **Pomeranz** and **Donahue** as a basis, for employee claims of breaches of the promise of fair and equitable treatment in an otherwise at-will employment context.

13. Instead of addressing BFI's properly presented, substantive arguments, the majority opinion erroneously ruled that its review of the jury award of $600,000 "is limited to whether the award is grossly or manifestly excessive and unsupported by the evidence." Slip Op. at 6.

14. The majority erroneously relies exclusively on tort cases for its standard of review and in deciding not to disturb the jury's award of the jury's award. Slip Op. at 1-3, citing **Keohane v. Stewart,** 882 P.2d 1293 (Colo. 1994) (damages for tort of defamation); **Jackson v. Moore,** 883 P.2d 622 (Colo. App. 1994) (wage-loss award for negligence causing employment-related injury); **Lee's Mobile Wash v. Campbell,** 853 P.2d 1140 (Colo. 1993) (damages in tort for rear-end collision); **Cottingham v. Star Bus Line,** 152 Colo. 188, 381 P.2d 25 (1963) (damages for auto collision); and **Good v. A.B. Chance Co.,** 39 Colo. App. 70, 565 P.2d 217 (1977) (damages for wrongful death). These are the wrong cases, and the Court should rehear this case and properly consider cases such as **Pomeranz,** 843 P.2d 1378, and **Donahue,** 690 P.2d 243.

15. Even as to the review of the evidence, this Court's reliance on **Good v. A.B. Chance Co.** is still

erroneous given that the upper end of the expert's testimony on the plaintiff's damages for the tort of wrongful death was "conservative." Here, in contrast, as the majority itself writes, Decker's expert "concluded that the present value of Decker's wage loss stemming from his discharge was *between* $52,194 and $440,716." Slip Op. at 2. Here, Decker's expert's "conservative" testimony was the $52,194 figure, and the expert's "unconservative" estimate was the $440,716 figure. Yet, the majority permits the jury's award, which exceeded this "unconservative," high-end estimate by several hundred thousand dollars, to stand. The Court should reconsider its reliance on **Good v. A.B. Chance Co.**

16. In fact, the majority opinion is confused on its face. The majority states, for example, that the expert for Decker testified for the jury "that a figure between $1,001,236 and $1,389,541 represented the *present value* of future earnings had he remained at BFI" Slip Op. at 2 (italics added). The majority opinion, however, then states that the plaintiff's expert "concluded that the *present value* of Decker's wage loss stemming from his discharge was *between* $52,194 and $440,716." Slip Op. 2 (italics added). The majority opinion further states that "the $440,716 figure assumed that Decker would have worked the same amount of *overtime* at BFI until age 65." Slip Op. at 2 (italics added). The majority opinion also states that this figure "assumed that Decker would find replacement employment and that his wage would *equal the average national wage* for high school graduates." Slip Op. at 2 (italics added). QUESTION: Why is not the

$440,716 figure the absolute maximum amount of damages recoverable by Decker for BFI's breach of the promise of fair and equitable treatment, when that $440,716 figure represents the maximum amount which a plaintiff could recover for what in effect is lifetime employment? If the figure of $440,716 represents (a) earning a full-time wage, *and* (b) earning wages for the "same amount of overtime at BFI," *and* (c) accounts for Decker finding "replacement employment at the national wage," why is that $440,716 not the absolute, top limit of damages recoverable by Decker for a breach of "the promise of fair and equitable treatment" in an otherwise at-will employment context? BFI submits that the majority opinion, as it is written, cannot answer these questions and is thus both logically flawed and internally inconsistent.

17. The majority opinion further states that "the expert's wage loss calculations were based upon Decker – a high school graduate – securing a job within five months after trial earning a wage equal to the average national wage for high school graduates." Slip Op. at 3. The majority opinion then states that Decker's expert "testified that wages for high school graduates in western Colorado, where Decker previously worked and still lived, were approximately 15% to 20% lower than the national averages upon which his computations were based." Slip Op. at 3. The majority then concludes that: "Thus, Decker's wage loss would be greater than the economist's projections should he either not secure a job within five months of the trial, or not be able to find work paying wages equivalent to the average national wage for high school graduates." Slip Op. at 3. That conclusion, however, does not logically follow. The majority already

stated that the $440,716 figure "assumed that Decker would find replacement employment and that his wage would *equal the average national wage* for high school graduates." Slip Op. at 2 (italics added). The logical conclusion is that Decker's wage loss cannot be greater than the $440,716 figure and that at best his wage loss would be less, not greater, precisely because Decker "previously worked and still lived" in western Colorado where wages are approximately 15% to 20% less than the national average. BFI respectfully submits that the majority should revisit its opinion and jettison its flawed reasoning.

18. For all of the foregoing reasons, BFI respectfully moves the Court to grant rehearing in this matter, to return the case to the docket and to order re-briefing and oral argument. In the alternative, should the Court deny BFI's petition for rehearing, the Court should grant BFI's petition for official publication filed contemporaneously herewith.

DATED this 6 day of November 1997.

**McNamara Law Firm, P.C.**

BY: John N. McNamara
John N. McNamara, Jr. #2471
McNamara Law Firm, P.C.
1669 17th Street, Suite 100
Denver, Colorado 80202
(303) 572-1660

James A. Clark, #1956
Kathryn A. Elzi, #10630
Baker & Hostetler
Suite 1100
303 East 17th Ave.
Denver, Colorado 80203

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing **DEFENDANT-APPELLANT'S PETITION FOR REHEARING** was served upon counsel for Thomas H. Decker by depositing the same in the United States mail, postage prepaid, this 6th day of November 1997:

Stefan Kazmierski,, Esq.
**BRIDGERS & KAZMIERSKI, L.L.C.**
6200 S. Syracuse Way, Suite 125
Englewood, Colorado 80111-4738
303-843-6234

Counsel for Plaintiff-Appellee

/s/ J. Stephens

## APPENDIX G

THE COURT OF APPEALS OF THE
STATE OF COLORADO

Case Number 93CA1427

ORDER

(Filed Dec. 12, 1997)

THOMAS H. DECKER V BROWNING-FERRIS INDUSTRIES OF COLORADO, INC.,

Upon consideration of the Petition for Rehearing filed by the Appellant herein, the Petition is hereby DENIED. Rothenberg, J., would GRANT. It is ordered that issuance of the Mandate is stayed to and including January 12, 1998, provided that if a Petition for Writ of Certiorari is timely filed with the Supreme Court of the State of Colorado, the stay shall remain in effect until disposition of the cause by the Supreme Court.

BY THE COURT:

Casebolt, J.
Marquez, J.
Rothenberg, J.

DATED: December 11, 1997

# APPENDIX H

Thomas H. **DECKER**, Petitioner,

v.

**BROWNING**-FERRIS INDUSTRIES OF
COLORADO, INC., Respondent.
Jose CASTILLO, Petitioner,

v.

**BROWNING**-FERRIS INDUSTRIES OF
COLORADO, INC., Respondent.

Nos. 95SC252, 95SC253.

Supreme Court of Colorado,
En Banc.

Jan. 13, 1997.

Rehearing Denied Feb. 24, 1997.

Stefan Kazmierski, Littleton, for Petitioners.

McNamara Law Firm, P.C., John N. McNamara, Jr., James D. Kilroy, Denver, and Baker & Hostetler, James A. Clark, Kathryn A. Elzi, Denver, for Respondent.

Barry D. Roseman, Denver, for Amicus Curiae Plaintiff Employment Lawyers Association.

Justice KIRSHBAUM delivered the Opinion of the Court.

In *Decker v. Browning-Ferris Industries of Colorado, Inc.*, 903 P.2d 1150 (Colo.App.1995), and *Castillo v. Browning-Ferris Industries of Colorado, Inc.*, No. 93CA1428 (Colo.App. Jan. 12, 1995) (not selected for publication), the court of appeals determined, *inter alia*, that plaintiffs-petitioners Thomas H. Decker (Decker) and Jose Castillo (Castillo) could not recover damages in tort from their employer, defendant-respondent Browning-Ferris Industries of Colorado, Inc. (BFI), for breach of an express covenant of good faith and fair dealing because no such tort exists in Colorado in the employment context. The court of appeals also remanded both cases to the trial court for new trials on damages because it could not determine from the special verdict forms and instructions on damages whether the juries had based their awards on the tort claims. Having granted certiorari to review the propriety of the court of appeals' decisions, we affirm in part, reverse in part, and remand the cases to the court of appeals with directions.

## I

### A

In June 1985, Decker obtained a position as a trash removal truck driver's helper with BFI. Decker was hired by Anthony Vagneur (Vagneur), the manager of BFI's Aspen, Colorado, district (the Aspen District), and was assigned to work in that district. In 1985, Decker earned a wage of $7.75 per hour.

Decker was subsequently promoted to the position of trash removal truck driver, which position Decker held for approximately five years. Decker received each pay increase for which he was eligible during his employment with BFI. In 1990, Vagneur wrote a letter to Decker informing Decker that he would receive a "discretionary" $400 bonus, congratulating Decker "on having a successful winter season with BFI," and stating that BFI appreciated

Decker's work. The letter contained a statement that BFI "look[ed] forward to a long and lasting relationship" with Decker.

Vagneur was Decker's immediate supervisor until January 1991, when BFI discharged Vagneur and replaced him with Gerald P. Vandervelde (Vandervelde). In August 1991, Vandervelde terminated Decker's employment for the stated reason that Decker worked too slowly. At this time Decker earned a wage of $11.50 per hour.

After his discharge from BFI, Decker obtained employment for a period of time as a truck driver for a newspaper company, earning $95 per day without benefits. Decker subsequently opened a restaurant using retirement funds accumulated during his employment at BFI as well as money borrowed from family members. At the time of trial, the restaurant was not profitable.

### B

Castillo was hired by Vagneur in 1989 as a trash removal truck driver's helper for BFI in BFI's Aspen district. During the course of his employment, Castillo was promoted to the position of driver and received approximately five pay raises. In 1990 Castillo received a letter from Vagneur congratulating Castillo on a "successful winter season with BFI," expressing BFI's appreciation for Castillo's work, informing Castillo of his entitlement to a "discretionary" $400 bonus, and containing a statement that BFI looked forward to a "long and lasting relationship" with Castillo.

In May 1991, Castillo broke his ankle while performing duties at BFI and reported the injury to BFI's workers' compensation physician. Castillo ultimately received workers' compensation benefits for this injury. In June 1991, Castillo obtained permission from his physician to return to BFI with the restriction that he perform only light duties. In August 1991 Vandervelde terminated Castillo's employment on the stated ground that Castillo was working too slowly.

After his employment at BFI was terminated, Castillo twice underwent surgery on his ankle. In December 1992, he worked for ten days as a dishwasher at a restaurant. He obtained a full-time position with another company in March 1993, earning a wage of $8.00 per hour with no benefits. At the time of trial, Castillo was still employed by that company.

## C

In early 1992, Decker and Castillo filed separate civil actions in the trial court against BFI. Because both Decker and Castillo were represented by the same counsel and had been discharged under similar circumstances from their employment with BFI, their complaints were identical in many respects. Decker and Castillo alleged, *inter alia*, that they had been discharged in violation of a progressive disciplinary policy adopted by Vagneur – a claim for wrongful discharge which sounded in contract.[1]

---

[1] Decker's complaint also alleged claims of discriminatory discharge, intentional interference with right to unemployment compensation benefits, and outrageous conduct. Castillo's

Decker and Castillo subsequently filed amended complaints against BFI which contained an additional claim of "breach of covenant of good faith and fair dealing" based on alleged express promises by BFI management that they would be treated fairly. Although the amended complaints characterized this as a contract claim, the amended complaints requested compensatory, non-economic and punitive damages with respect to this claim.

Castillo's action was tried first. At trial, Vagneur testified that he had personally promised to treat Castillo fairly. During the instruction conference, BFI objected to the instructions and special verdict forms which would permit the jury to award punitive damages on the breach of covenant of good faith and fair dealing claim. BFI argued that this claim sounded in contract, and punitive damages are not available for a breach of contract. The trial court held that while the covenant of good faith and fair dealing may have had its origins in contract law, its breach constituted a tort and could thus properly support an award of punitive damages. Aside from this one objection to the submission of punitive damages, BFI raised no other objection concerning the covenant of good faith and fair dealing claim, either as to the instruction defining its elements or to the special verdict form which permitted the jury to award damages for "inconvenience and emotional stress" in the event of its breach. At closing arguments, neither party made any distinction between

---

complaint also alleged that he was discharged in retaliation for filing a workers' compensation claim against BFI. None of these claims are at issue here.

contract and tort theories concerning the claim for breach of express covenant of good faith and fair dealing, but merely discussed whether BFI had breached its promises of fair treatment to Castillo.

The jury returned a verdict in favor of Castillo and against BFI. The jury determined that BFI had adopted a personnel policy concerning discipline and termination and had breached that policy. The jury also determined that BFI had promised fair treatment to Castillo in its employment decisions and had breached that promise as well. The jury awarded Castillo $33,500 in damages for lost income, determined that BFI's breach of covenant of good faith and fair dealing was attended by circumstances of willful and wanton conduct by BFI, and awarded Castillo punitive damages in the amount of $11,500. The jury did not award Castillo damages for inconvenience or emotional stress. BFI did not file any post-trial motions.

With respect to Decker's claims, BFI expressly stipulated at trial that it had promised to treat Decker fairly. BFI also raised the same objections concerning punitive damages that it had raised in Castillo's case, and the trial court likewise denied them for the same reasons. The parties similarly never raised the contract/tort distinction before the jury, but merely discussed whether BFI had breached its promises of fair treatment to Decker. The jury returned a verdict in favor of Decker and against BFI on the breach of disciplinary policy and breach of covenant of good faith and fair dealing claims. As in Castillo's case, the jury found that BFI had terminated Decker in violation of both its progressive disciplinary policy and its express promise of fair treatment. The jury also found that BFI had willfully and wantonly breached its promises of good faith and fair dealing. The jury awarded Decker $600,000 in damages for lost income, $80,000 in damages for inconvenience and emotional stress, and an additional $680,000 in punitive damages on the claim of breach of covenant of good faith and fair dealing.

BFI filed post-trial motions which focused largely on the matter of the punitive damage award. BFI adopted the trial court's characterization of the covenant of good faith and fair dealing claim as a tort, and stipulated that the claim had been tried as a tort. BFI argued that Colorado did not recognize a tort claim for breach of an express covenant of good faith and fair dealing in the employment context. Decker asserted that although in *Farmer v. Central Bancorporation, Inc.*, 761 P.2d 220, 221-22 (Colo.App.1988), the court of appeals determined that no tort claim may be based on an implied covenant of good faith and fair dealing in the employment context, no Colorado appellate court had addressed the question of whether a tort claim for breach of an express covenant of good faith and fair dealing may be viable in the employment context. Decker argued that such a tort claim was analogous to the tort claim of breach of the implied covenant of good faith and fair dealing available in the context of insurance law. *See, e.g., Travelers Ins. Co. v. Savio*, 706 P.2d 1258, 1273-74 (Colo.1985). The trial court denied BFI's post-trial motions for the reasons stated in Decker's opposition brief.

## D

BFI appealed both cases. Throughout the appellate proceedings before this court and the court of appeals, the parties have referred to the breach of disciplinary policy claim as the "contract" claim, and the breach of express covenant of good faith and fair dealing claim as the "tort" claim. The primary issue presented which the parties framed for the court of appeals was whether Colorado recognized a tort claim for breach of an express covenant of good faith and fair dealing in the employment context.

In Decker's case, the court of appeals accepted the parties' characterizations of the breach of disciplinary policy claim as a contract claim and the breach of covenant of good faith and fair dealing claim as a tort claim. The court of appeals affirmed the jury's determination of liability on the breach of contract claim, but determined that because Colorado does not recognize a tort claim in the employment context for breach of covenant of good faith and fair dealing, the trial court erroneously allowed the jury to consider that claim. *Decker*, 903 P.2d at 1156-57. The court of appeals concluded that in the absence of a viable tort claim, the awards for punitive damages and noneconomic damages must be vacated. *Id.* at 1157.

The court of appeals held that the punitive damage award could not be based upon the breach of the progressive disciplinary policy claim because it was a contract claim. *Id.* With respect to the award of noneconomic damages, the court observed that while damages for "mental suffering" are sometimes recoverable for willful and wanton breach of contract, the jury in this case was not requested to find willful and wanton breach of the progressive disciplinary policy. *Id.* at 1157-58. The court of appeals also determined that the award of noneconomic damages was improper because noneconomic damages may be awarded in a breach of contract action only for "mental suffering," and the jury instructions allowed the jury to consider future noneconomic losses as well as inconvenience and emotional stress. *Id.* at 1158. The court of appeals noted that Decker could on retrial seek damages for mental suffering for breach of contract if he proved that BFI's breach of the progressive disciplinary policy was willful or wanton. *Id.* In setting aside the award of $600,000 for lost income, the court of appeals concluded that it was impossible to discern from the special verdict form under which theory the lost income was awarded, and that it must be presumed that BFI had been prejudiced by the special verdict form. *Id.*

The court of appeals employed an identical analysis in Castillo's appeal. It held that Colorado does not recognize a tort claim for breach of covenant of good faith and fair dealing in the context of employment relations, and set aside the jury's award of punitive damages based on that claim. *Castillo,* No. 93CA1428, slip op. at 4. It also affirmed the jury's verdict on liability for breach of the progressive disciplinary policy, but held that the award of economic damages had to be vacated because it was impossible to determine whether it had been awarded under the proper contract theory or the improper tort theory. *Id.* at 4-5. The court of appeals thus remanded both cases for new trials on damages.

## II

Decker and Castillo argue that tort claims for breach of express covenant of good faith and fair dealing are cognizable in Colorado in the employment context. We reject this argument.

### A

As a preliminary matter, we note that the issues framed by the parties here and addressed by the court of appeals are in tension with the issues submitted to and determined by the juries in these cases. BFI maintains that in each case the claim for breach of express covenant of good faith and fair dealing was "tried as a tort." Decker and Castillo agree, and urge us to recognize the viability of such a tort claim in Colorado.

However, the pleadings, closing arguments, instructions, and verdict forms made no such distinction. To the contrary, the language of the pleadings, instructions, and verdict forms establish the claims as contract claims. In denying BFI's objection to punitive damage instructions in *Castillo,* the trial court stated its view that Castillo's claim for breach of covenant of good faith and fair dealing was a tort claim. Nevertheless, the parties never amended their pleadings to reflect such distinction and never suggested to the juries that some of the claims were tort claims. While the issues framed for appeal properly sought review of the trial court's implied conclusion that a tort claim for breach of express covenant of good faith and fair dealing exists in Colorado, in determining what effect the contrary conclusion reached by the court of appeals might have on the jury verdicts, we consider those verdicts in light of the manner in which the cases were tried.

Decker and Castillo asserted claims against BFI for breach of covenant of good faith and fair dealing on the ground that BFI admittedly made express promises to them to treat them fairly. The amended complaints do not allege that BFI breached legal duties in discharging Decker and Castillo in bad faith. The amended complaints allege that BFI's actions constituted breaches of express promises of fair and equitable treatment. Such claims sound in contract, not in tort.[2]

Certain trial court rulings contributed to the confusion in these cases. In denying BFI's motion for summary judgment in Castillo's case, the trial court stated that "in some circumstances, an implied covenant of good faith can arise in the employment context if there are expressed representations to the employees that they are guaranteed fair treatment and equitable dealing." Subsequently, in denying BFI's objection to instructions and verdict forms permitting an award of punitive damages on Castillo's breach of covenant claim on the ground that such an award would be improper because the claim was a contract claim, the trial court made the following statements:

---

[2] The amended complaints characterized the breach of express covenant of good faith and fair dealing claims as claims for breach of contract, although the amended complaints contained requests for punitive damages for the contractual breaches. However, the record reveals that BFI did not object to the demands for punitive damages in response to the alleged breaches of contract until the instruction conference at Castillo's trial.

> With regard to your objection concerning a punitive instruction on punitive damages as to the claim for breach of the covenant of good faith and fair dealing, I'm going to give that instruction because I believe that that claim, being in the nature of a tort claim – although it may have its origins in contract law – nonetheless, can be characterized fairly as a tort claim; and just as in most or almost all other tort claims, if the circumstances are warranted and there's evidence supporting a claim for punitive damages claim, the court is required to so instruct the jury.

While these rulings in effect altered the basic theory of recovery established by the pleadings, no effort was made to inform the jury of such change.[3]

The amended complaints alleged claims of breach of express covenant of good faith and fair dealing as contract claims. More importantly, the jury instructions related only to contract theories of recovery. The jury instructions on the claim of breach of covenant of good faith and fair dealing read in pertinent part as follows:

> In order for the plaintiff, [Castillo/Decker], to recover from the defendant, BFI, on his claim for breach of the covenant of good faith and fair dealing, you must find that all of the following have been proven:
>
> 1. BFI expressly told [Castillo/Decker] that he would be treated fairly and in good faith in matters of his employment;

---

[3] Parallel rulings in Decker's later trial were made and disposed of by reference to the record from Castillo's trial.

> 2. BFI demonstrated to [Castillo/Decker] a willingness to be bound by such policy;
>
> 3. [Castillo/Decker] reasonably understood that BFI was promising fair treatment as a part of the terms and conditions of employment, and, with that understanding, [Castillo/Decker] continued his employment with BFI; and
>
> 4. BFI discharged [Castillo/Decker] without complying with its statements of good faith and fair treatment.

The special verdict form in *Castillo* contained the following interrogatories:

> Did BFI promise fair treatment to Jose Castillo in its employment decisions? (Yes or No)
>
> Did BFI breach its promise of fair treatment in its firing of Jose Castillo? (Yes or No)

The jury answered yes to both questions. The special verdict form in Decker and corresponding response are substantially identical. Neither party objected to the contents of these instructions and special verdict forms.[4]

The record thus reflects that the juries were not asked to find whether BFI owed or breached any legal duty of good faith and fair dealing to Decker and Castillo. Rather, the juries were asked to find, and did find, that BFI had made and breached promises of good faith and fair dealing to Decker and Castillo. The juries found that BFI breached contracts, not that BFI committed torts.

---

[4] Some of the instructions on the breach of covenant of good faith and fair dealing in each case refer to "express" representations of fair treatment by BFI, while other instructions refer to an "implied" covenant. The special verdict forms refer only to BFI's "promises" and do not specify whether those promises were express or implied.

### B

In view of the trial court's characterization of the claims of good faith and fair dealing as "tort" claims, in its motion for new trial and on appeal BFI has argued that no such tort claim is cognizable in Colorado. Decker and Castillo argue on appeal that an independent tort claim for breach of express covenant of good faith and fair dealing should be recognized in the employment context. The court of appeals rejected the arguments of Decker and Castillo. We affirm the court of appeals' resolution of this issue.

### 1

The court of appeals has declined to recognize the existence of an implied covenant of good faith and fair dealing in the context of otherwise at-will employment contracts.[5] *Farmer v. Central Bancorporation, Inc.*, 761 P.2d 220, 221-22 (Colo.App.1988); *Montoya v. Local Union III, Int'l Bhd. of Elec. Workers*, 755 P.2d 1221, 1225 (Colo.App.1988); *Pittman v. Larson Distrib. Co.*, 724 P.2d

---

[5] The questions in this case arise in the context of claims alleging breaches of express covenants of good faith and fair dealing in the employment context. We therefore express no opinion with respect to questions relating to the recognition of an implied covenant of good faith and fair dealing in the employment context.

1379, 1385 (Colo.App.1986). The court of appeals has also determined that in contractual disputes not arising in the employment context no independent tort claim for alleged breach of an implied covenant of good faith and fair dealing exists. *See Centennial Square, Ltd. v. Resolution Trust Co.*, 815 P.2d 1002, 1004 (Colo.App.1991); *Colorado Interstate Gas Co. v. Chemco, Inc.*, 833 P.2d 786, 792-93 (Colo.App.1991), aff'd on other grounds, 854 P.2d 1232 (Colo.1993); *Friedman v. Colorado Nat'l Bank*, 825 P.2d 1033, 1042-43 (Colo.App.1991), aff'd on other grounds, 846 P.2d 159 (Colo.1993).

Other jurisdictions have similarly concluded that an employee may not recover in tort from an employer on the basis of a claim for breach of an implied covenant of good faith and fair dealing. *See, e.g., Hoffman-La Roche, Inc. v. Campbell*, 512 So.2d 725, 738 (Ala.1987); *Wagenseller v. Scottsdale Mem'l Hosp.*, 147 Ariz. 370, 385, 710 P.2d 1025, 1040 (1985); *Foley v. Interactive Data Corp.*, 47 Cal.3d 654, 254 Cal.Rptr. 211, 765 P.2d 373 (1988); *Metcalf v. Intermountain Gas Co.*, 116 Idaho 622, 626, 778 P.2d 744, 748 (1989); *Martin v. Federal Life Ins. Co.*, 109 Ill.App. 3d 596, 65 Ill.Dec. 143, 151, 440 N.E.2d 998, 1006 (1982); *Noye v. Hoffmann-La Roche Inc.*, 238 N.J.Super. 430, 570 A.2d 12, 15 (App.Div.1990); *Bourgeous v. Horizon Healthcare Corp.*, 117 N.M. 434, 439, 872 P.2d 852, 857 (1994); *Dvorak v. Pluswood Wis., Inc.*, 121 Wis.2d 218, 358 N.W.2d 544, 546 (Ct.App.1984); *see also ARCO Alaska, Inc. v. Akers*, 753 P.2d 1150, 1154 (Alaska 1988) (tort recovery for breach of implied covenant of good faith and fair dealing permitted only where conduct "rises to the level of a traditionally recognized tort").[6]

These cases recognize that parties to a contract may as a part of their agreement enter into an express covenant of good faith and fair dealing. Such a covenant is designed to ensure the enforcement of other obligations assumed by the parties, *see Amoco Oil Co. v. Ervin*, 908 P.2d 493, 498 (Colo.1995); *Foley v. Interactive Data Corp.*, 47 Cal.3d 654, 254 Cal.Rptr. 211, 217, 765 P.2d 373, 389 (1988), and in effect becomes a term of the employment agreement. *See Wagenseller v. Scottsdale Mem'l Hosp.*, 147 Ariz. 370, 383, 710 P.2d 1025, 1038 (1985); *Foley*, 254 Cal.Rptr. at 227, 765 P.2d at 389; *Metcalf v. Intermountain Gas Co.*, 116 Idaho 622, 627, 778 P.2d 744, 749 (1989). The covenant of good faith and fair dealing in employment matters thus serves to protect the integrity of all of the promises made by the parties to the agreement setting forth the terms and conditions of employment. *See Metcalf*, 116 Idaho at 627, 778 P.2d at 749. A breach of such a covenant therefore constitutes a breach of an obligation created by the contract, *Foley*, 254 Cal.Rptr. at 232, 765 P.2d at 394; *Metcalf*, 116 Idaho at 627, 778 P.2d at 749, rather than breach of an obligation arising independently from the contract, *see Dvorak v. Pluswood Wis., Inc.*, 121 Wis.2d 218, 358 N.W.2d 544, 545-46 (Ct.App.1984).

---

[6] Decker and Castillo observe that some courts have recognized the availability of a claim for breach of an express covenant of good faith and fair dealing in the employment context. *See Stahl v. Sun Microsystems, Inc.*, 775 F.Supp. 1394 (D.Colo.1991), aff'd, 19 F.3d 533 (10th Cir.1994); *Rosales v. AT & T Info. Sys., Inc.*, 702 F.Supp. 1489 (D.Colo.1988); *Price v. Federal Express Corp.*, 660 F.Supp. 1388 (D.Colo.1987). Although the opinions in these cases do suggest that such a claim may exist in the employment context, none of the opinions addresses the question of whether such a claim is cognizable in tort.

2

We have recognized in the context of insurance contracts that a party to such an agreement may recover damages in tort for breach of an implied covenant of good faith and fair dealing. *Travelers Ins. Co. v. Savio*, 706 P.2d 1258, 1273-74 (Colo.1985); *Farmers Group, Inc. v. Trimble*, 691 P.2d 1138, 1141-42 (Colo.1984). An insurer's tort liability for breach of an implied duty of good faith and fair dealing arises from the nature of the insurance contract as well as from the relationship between the insurer and the insured. *Lira v. Shelter Ins. Co.*, 913 P.2d 514, 516 (Colo.1996); *Trimble*, 691 P.2d at 1141; *see Savio*, 706 P.2d at 1272. In contrast to a party who seeks to secure commercial advantage in the context of a general commercial contract, an insured who enters into a contract of insurance seeks to obtain "financial security and protection against calamity." *Trimble*, 691 P.2d at 1141. Because an insurer's bad faith refusal to pay valid claims defeats the very purpose of the insurance contract, a special duty is imposed upon an insurer to deal in good faith with an insured. *Id.* This "quasi-fiduciary" relationship between an insurer and an insured is thus based in part on this special contract. *Id.* In addition, when an insured suffers a loss, the insured becomes "particularly vulnerable" to the insurer. *Savio*, 706 P.2d at 1273 (citing *Bibeault v. Hanover Ins. Co.*, 417 A.2d 313, 318 (R.I.1980)). For example, an insurer may delay payment of a claim to the insured in the hope of settling for an amount less than what might be due under the contract. Thus the implied covenant of good faith and fair dealing in the context of insurance contracts also arises from the heightened reliance necessarily placed by an insured on the insurer. *K Mart Corp. v. Ponsock,* 103 Nev. 39, 732 P.2d 1364, 1370 (1987).

Decker and Castillo suggest that an employment relationship possesses many of the characteristics found in the relationship between an insurer and an insured in support of their argument that a covenant of good faith and fair dealing should be imposed in the former context. The insurance analogy has been rejected by several courts. *E.g., Wagenseller,* 147 Ariz. at 385, 710 P.2d at 1040; *Foley,* 234 Cal.Rptr. at 234, 765 P.2d at 396; *Barry v. Posi-Seal Int'l,* 40 Conn.App. 577, 672 A.2d 514, 520 (1996); *Noye v. Hoffmann-La Roche Inc.,* 238 N.J.Super. 430, 570 A.2d 12, 15 (App.Div.1990); *Bourgeous v. Horizon Healthcare Corp.,* 117 N.M. 434, 872 P.2d 852, 857 (1994); *Dvorak v. Pluswood Wis., Inc.,* 121 Wis.2d 218, 358 N.W.2d 544, 546 (Ct.App.1984).

There are certain parallels between insurance and employment contexts. An insurance contract protects the insured from such calamities as medical emergencies and accidental property damage. An employment contract is of even greater significance to an employee because it provides the means for the employee to meet his or her basic needs. Thus both insurance and employment contracts afford financial security to the insured and the employee, respectively.

However, the positions of insureds and of employees who suffer harm as a result of unreasonable conduct are not always similar. A wrongfully discharged employee may be able to obtain alternative employment and must make reasonable attempts to do so to mitigate damages. *Foley*, 254 Cal.Rptr. at 244, 765 P.2d at 396; *see Technical Computer Servs., Inc. v. Buckley*, 844 P.2d 1249, 1255 (Colo.App.1992). Unreasonably discharged employees who are not able to secure alternative employment may recover damages for lost income.[7] *See* 8 Employment Coordinator ¶ 29,509 (1993); *see also Western Distrib. Co. v. Diodosio*, 841 P.2d 1053, 1058 (Colo.1992); *Saxonia Mining & Reduction Co. v. Cook*, 7 Colo. 569, 572, 4 P. 1111, 1112-13 (1884). In contrast, an insured whose valid claim for coverage has been denied in bad faith has no recourse in the marketplace. *Foley*, 254 Cal.Rptr. at 244, 765 P.2d at 396. No other insurance company will assume responsibility for the insured's losses. *Id.* It is also noteworthy that the interests of insureds and insurers may conflict. *Id.* An insurer has an incentive to delay payment of a valid claim in the hope of settling for an amount less than the sum owed pursuant to the policy. *Savio*, 706 P.2d at 1273 (citing *Bibeault v. Hanover Ins. Co.*, 417 A.2d 313, 318 (R.I.1980)). In contrast, employees as well as employers generally seek to promote the business interests of the employer. Of course, the possibility of arbitrary and unreasonable treatment by an employer always exists – a phenomenon which can not be prevented by reliance on the dynamics of the marketplace.

---

[7] Of course, a wrongfully discharged employee may suffer injuries not compensable by contract damages, such as foreclosure of a mortgage on a home because of the owner employee's inability to make required payments.

Some courts have applied rationales developed in insurance contract cases to recognize a tort claim for breach of covenant of good faith and fair dealing in employment cases. In *K Mart Corp. v. Ponsock,* 103 Nev. 39, 732 P.2d 1364, 1370 (1987), the plaintiff was employed by the defendant as a forklift driver. The defendant consistently characterized the plaintiff as an excellent employee. *Id.* at 1366. The plaintiff's retirement benefits were due to vest after the plaintiff had been employed for ten years. *Id.* A few months before the plaintiff's retirement benefits were due to vest, the plaintiff was terminated by the defendant, allegedly for applying paint to the battery cover of the forklift which he operated. *Id.* The plaintiff, without securing permission from his supervisor, had applied paint from a can he discovered earlier in the day to the battery cover in order to remedy the deteriorating condition of that cover. *Id.* When asked by a maintenance worker to remove the paint, the plaintiff complied. *Id.* at 1367. The plaintiff was reprimanded by a supervisor for his conduct, and his "separation report" provided that he had been terminated for defacing company property with misappropriated merchandise (the paint) on company time. *Id.*

A jury determined that the defendant had in reality terminated the plaintiff in order to avoid paying the plaintiff's retirement benefits. *See id.* at 1368. The court concluded that the plaintiff was entitled to tort damages, reasoning that the employee was highly economically dependent upon the employer and vulnerable to the employer's abuse because of that dependency. *Id.* at 1372. The court determined that the particular employment relationship at issue was similar to the relationship between an insured and an insurer because the plaintiff specially relied on the defendant's apparent commitment to retain the plaintiff until retirement. *Id.*

The court limited its holding to the particular factual circumstances of the case as follows: "The special relationships of trust between this employer and this employee under this contract under this type of abusive and arbitrary dismissal cries out for relief and for a remedy beyond that traditionally flowing from breach of contract." *Id.* (emphasis in original). In *D'Angelo v. Gardner*, 107 Nev. 704, 819 P.2d 206 (1991), the Supreme Court of Nevada distinguished Ponsock in holding that a plaintiff employee was not entitled to an award of tort damages, comparing the facts of that case to the facts of *Ponsock* and describing *Ponsock* as "the exemplar for that narrow class of cases in which, because of the relationship of employer to employee, the offending conduct 'goes well beyond the bounds of ordinary liability for breach of contract.' " *D'Angelo*, 819 P.2d at 215 (quoting *Ponsock*, 732 P.2d at 1370); *see Martin v. Sears, Roebuck & Co.*, 111 Nev. 923, 899 P.2d 551, 555 (1995) (characterizing *Ponsock* as "fact-specific").

In *Wilder v. Cody Country Chamber of Commerce*, 868 P.2d 211 (Wyo.1994), the Supreme Court of Wyoming observed that a relationship similar to that between an insurer and insured "may be present" between an employer and employee, but determined that such a relationship was not present in that case. *Id.* at 220-22. The court opined that recovery in tort might be warranted if the conduct complained of was "egregious" and that the special relationship of trust and reliance asserted for recovery of tort damages was not established solely by the employment relationship itself, but by such other circumstances as the existence of separate consideration, common law or statutorily established rights, or special rights resulting from longevity of service. *Id.* at 220. The court determined that the employment relationship in that case was not one of special trust and reliance and concluded that the employer had not breached the implied covenant of good faith and fair dealing. *Id.* at 222; *see also Drake v. Cheyenne Newspapers, Inc.,* 891 P.2d 80, 83 (Wyo.1995).

In view of these cases, it is not clear that the rationales supporting recognition of the tort of breach of covenant of good faith and fair dealing in the context of insurance contracts require recognition of a tort claim for bad faith breach of an express covenant of good faith and fair dealing in the employment context.

### 3

However, we conclude that a tort claim for breach of covenant of good faith and fair dealing need not be recognized in the employment context because we have previously recognized the existence a tort claim for wrongful discharge in violation of public policy. *Rocky Mountain Hosp. & Med. Serv. v. Mariani,* 916 P.2d 519, 521 (Colo.1996). That claim, as well as tort claims for bad faith breach of insurance contracts, are firmly grounded in legislative or other public policy declarations thus insuring that all interested parties are aware of the scope of the relevant duty. In *Mariani,* we found support for recognition of a tort claim for wrongful discharge in violation of public policy in the State Board of Accountancy Rules of Professional Conduct. *Mariani*, 916 P.2d at 525. Our recognition of the tort of bad faith breach of an insurance contract in *Farmers Group, Inc. v. Trimble*, 691 P.2d 1138 (Colo.1984), is also grounded in the provisions of the Colorado Auto Accident Reparations Act, sections 10-4-701 to -725, 4A C.R.S. (1994).[8]

It is thus apparent that the torts of wrongful discharge in violation of public policy and bad faith breach of the implied covenant of good faith and fair dealing inherent in insurance contracts are based on administrative or legislative declarations of public policy. As a result, employers and insurers have notice of the scope of their duties to their employees and insureds. No parallel declarations of public policy have been articulated by the General Assembly or other governmental institutions with respect to the employment context. In the absence of such declarations of public policy, there is no appropriate basis upon which to ground a tort of breach of an express covenant of good faith and fair dealing in employment contracts. To the extent the contents of employment contracts and insurance contracts are similar, the tort of wrongful termination of an employment contract in violation of public policy represents an appropriate analog to the tort of bad faith breach of the implied covenant of good faith and fair dealing of an insurance contract.

---

[8] Three years after we decided Trimble, the General Assembly expanded the scope of tort claims for breach of the implied covenant of good faith and fair dealing by the adoption of § 10-3-1113(1), 4A C.R.S. (1994), which statute contains the following provisions:

In any civil action for damages founded upon contract, or tort, or both against an insurance company, the trier of fact may be instructed that the insurer owes its insured the duty of good faith and fair dealing, which duty is breached if the insurer delays or denies payment without a reasonable basis for its delay or denial. This statute reflects the public policy concerns underlying the tort of breach of the implied covenant of good faith and fair dealing in an insurance context. In this regard, the tort for bad faith insurance breach has been described as a "public policy tort." Brian F. Berger, Note, Defining Public Policy Torts in At-Will Dismissals, 34 Stan. L.Rev. 153, 163-65 (1981-82).

## III

For the foregoing reasons, we decline to recognize the existence in this jurisdiction of a tort claim for breach of an express covenant of good faith and fair dealing in employment contracts. However, we have concluded that the claims for breach of express covenant of good faith and fair dealing asserted by *Decker* and *Castillo* sound in contract, not in tort. We therefore address issues respecting the damage awards in these cases.

### A

*Decker* and *Castillo* assert that the court of appeals erred in reversing the judgments of punitive damages entered by the trial court. We reject this argument.

In *Mortgage Finance, Inc. v. Podleski*, 742 P.2d 900 (Colo.1987), we emphasized that the law of torts and the law of contracts reflect different policies and, therefore, recognize different remedies. The law of contracts does not seek to compel performance of a contract by punishing a breach, but rather to compensate the promisee for losses sustained as a result of a breach. *Id.* at 902. The law of torts is premised upon legal duties imposed by law. *Id.* at 903. Breach of such legal duties can, in certain circumstances, justify the imposition of exemplary damages in order to punish the defendant and deter others from similar conduct in the future. *Id.* at 902-03.

Here, as in *Podleski*, we are faced with conduct which amounts to a breach of contract, and "no tort claim was before the trial court at the conclusion of the trial." *Id.* at 903. Under such circumstances, the awards of punitive damages must be vacated, as the court of appeals determined.

### B

Decker and Castillo argue that the court of appeals erroneously reversed the juries' verdicts awarding them economic damages. We agree.

In *Castillo*, the jury was given the following instruction on damages:

> If you find in favor of the plaintiff, Jose Castillo, you shall award as his actual damages, insofar as they have been proved by a preponderance of the evidence and insofar as they were caused by the defendant's wrongful or retaliatory discharge of the plaintiff, an amount which will reasonably compensate the plaintiff for his losses, if any. In determining such damages, you shall consider the following:
>
> 1. any noneconomic losses or injuries incurred to the present time or which will probably be incurred in the future, including an amount

> which will reasonably compensate the plaintiff for any mental suffering; and
>
> 2. any economic losses incurred to the present time or which will probably be incurred in the future, including back pay, loss of future pay and loss of benefits.

The parallel instruction in *Decker* contains almost identical language.[9] Similarly, although the special verdict forms require the juries to reach separate liability determinations with respect to the breach of progressive disciplinary policy and breach of covenant of good faith and fair dealing claims, such forms do not require the juries to distinguish between the two claims when determining whether damages for lost income, inconvenience and emotional stress should be awarded. In each case, the special verdict form provides that if the jury finds BFI liable on either claim, the jury should "state the amount of lost income, if any, suffered. . . . " In addition, the special verdict forms allowed the juries to award damages for "inconvenience and emotional stress" if they answered "yes" to liability on either the breach of disciplinary policy or breach of covenant of good faith and fair dealing claim.

---

[9] The instruction in *Decker* stated:

If you find in favor of the plaintiff, Thomas H. Decker, you shall award as his actual damages, insofar as they have been proved by a preponderance of the evidence and insofar as they were caused by BFI's wrongful discharge of Mr. Decker, an amount which will reasonably compensate Mr. Decker for his losses, if any. In determining such damages, you shall consider the following:

1. any noneconomic losses or injuries incurred to the present time or which will probably be incurred in the future, including an amount which will reasonably compensate Mr. Decker for any mental suffering; and

2. any economic losses incurred to the present time or which will probably be incurred in the future, including back pay, loss of future pay and loss of benefits.

The court of appeals concluded that it was "impossible" to discern whether the awards for economic damages were based on the proper breach of disciplinary policy claim or the improper breach of covenant of good faith and fair dealing claim. *Decker,* 903 P.2d at 1158. However, as we have observed, in each case both the claim for breach of the progressive disciplinary policy and the claim for breach of express covenant of good faith and fair dealing were pled, tried, and found by the jury to be breaches of an express contractual obligation. The juries' calculations of economic damages in these cases were limited by the instructions to "back pay, loss of future pay and loss of benefits," which are appropriate economic damages designed to put the wrongfully discharged employee in the same position he or she would have been in had the employer not breach [sic] the employment contract. 8 Employment Coordinator ¶ 29,509 (1993).[10] Under the circumstances of these cases, we conclude that the juries' awards of economic damages to Decker and to Castillo should be affirmed.

---

[10] We reject BFI's argument that the awards of lost income include amounts for noneconomic damages. The special verdict forms clearly differentiate between these two categories of actual damages and contain separate interrogatories with respect to damages for "lost income" and damages for "inconvenience and emotional stress."

### C

Decker argues that in the event that we should refuse to recognize a tort claim for breach of express covenant of good faith and fair dealing, we should treat the jury's findings on that claim as a finding that BFI's breach of contract was attended by willful and wanton conduct and thereby uphold the jury's award of $80,000 in noneconomic damages.[11] We agree.

The special verdict form submitted to the jury authorized an award of punitive damages if the jury found "with respect to Thomas Decker's claim for breach of the covenant of good faith and fair dealing, that the injury, if any, was attended by circumstances of willful and wanton conduct by BFI." The jury found that BFI's conduct in firing Decker was willful and wanton.

Although we have concluded that the juries' awards of punitive damages must be vacated, the jury's special verdict with respect to Decker's claims establishes that the jury found that BFI breached an express contractual obligation to Decker and that such breach was characterized by willful and wanton conduct. Damages for "mental suffering" are recoverable on a breach of contract claim when the breach is accompanied by willful and wanton conduct and when the damages are a natural and proximate consequence of such conduct. *Trimble v. City & County of Denver*, 697 P.2d 716, 731 (Colo.1985). Here, the jury awarded noneconomic damages specifically for

---

[11] We confine our analysis here to Decker's case because the jury in Castillo's case did not award any noneconomic damages for inconvenience and emotional stress.

"inconvenience and emotional stress" caused in part by BFI's breach of its promise of fair treatment. Thus, the award of $80,000 in noneconomic damages for BFI's willful and wanton breach of its express covenant of good faith and fair dealing is proper under Colorado law, and must be upheld.[12]

### D

Because the court of appeals reversed all of the damage awards against BFI, it did not address BFI's claim that the jury's award of $600,000 to Decker in lost wages was excessive.[13] As noted in part I(A), at the time of his discharge Decker earned a wage of $11.50 per hour. Considering the testimony of Decker's economic expert in the light most favorable to Decker as the verdict winner, it is clear that the jury's award of $600,000 in economic damages includes a substantial amount for front pay, or lost future wages.

Thus, while we affirm the jury's finding that BFI is liable to Decker for economic damages, we remand

---

[12] The record also reveals that BFI failed to raise any specific objection at trial to the special verdict form which permitted the jury to award noneconomic damages to Decker for what BFI maintained were contractual claims. Such inaction constitutes waiver of the issue. *See Bear Valley Church of Christ v. DeBose*, 928 P.2d 1315 (Colo. 1996). Moreover, on appeal to the court of appeals BFI did not challenge the $80,000 award of noneconomic damages to Decker, and has not responded to Decker's argument before us with respect to that portion of the jury's verdict.

[13] BFI did not challenge the award of $33,500 in economic damages to Castillo as being excessive.

Decker's case to the court of appeals for consideration of BFI's arguments challenging the amount of the jury's award of economic damages in that case.

## IV

For the foregoing reasons, we affirm the judgments of the court of appeals insofar as that court determined that no tort claim for breach of an express covenant of good faith and fair dealing exists in the employment context in Colorado. We reverse the court of appeals' judgments insofar as they set aside the jury verdicts awarding Decker and Castillo economic damages and awarding Decker noneconomic damages. We remand the cases to the court of appeals with directions to reinstate those portions of the jury verdicts and to conduct further proceedings in Decker's case, No. 95SC252, consistent with this opinion.

## APPENDIX I

SUPREME COURT, STATE OF COLORADO
Cases Nos. 95 SC 252 and 95 SC 253

---

**95SC252**

THOMAS H. DECKER,

Petitioner,

v.

BROWNING-FERRIS INDUSTRIES OF COLORADO, INC.,

Respondent.

**95SC253**

JOSE CASTILLO,

Petitioner,

v.

BROWNING-FERRIS INDUSTRIES OF COLORADO, INC.,

Respondent.

---

## RESPONDENT'S PETITION FOR REHEARING

---

Certiorari to the Court of Appeals
January 12, 1995, Case Nos. 93CA1427 and 93CA1428
Court of Appeals Opinions by Judge Casebolt
(Judges Marquez and Rothenberg concurring)

District Court, Adams County, Colorado
Civil Action Nos. 92 CV 185 and 92 CV 569
Honorable John J. Vigil

MCNAMARA LAW FIRM, P.C.
John N. McNamara, Jr., No. 2471
James D. Kilroy, No. 20872
1660 17th Street, Suite 100
Denver, Colorado 80202
Telephone: (303) 572-1660

BAKER & HOSTETLER
James A. Clark, No. 1956
Kathryn A. Elzi, No. 10630
303 E. 17th Avenue, Suite 1100
Denver, Colorado 80203
Telephone: (303) 861-0600

ATTORNEYS FOR RESPONDENT
BROWNING-FERRIS INDUSTRIES OF
COLORADO, INC.

Respondent Browning-Ferris Industries of Colorado, Inc. (BFI) petitions this court for rehearing of its January 13, 1997 decision.

BFI's grounds for rehearing are: 1) this court has decided this case on grounds outside of the issues framed by the grant of certiorari, and equally important, this court has decided an issue that should have been decided, if at all, by the court of appeals; and 2) the record does not support this court's conclusion that BFI agreed that Colorado recognizes a claim, *in contract*, for breach of a covenant of good faith and fair dealing in the employment context.

## The Grant of Certiorari and the Court of Appeals Decision

In holding that Colorado recognizes a claim *in contract* for breach of an express covenant of good faith and fair dealing in the employment context, this court decided an issue that was not ruled upon by the court of appeals. In its opinion in Mr. Decker's case, the court of appeals stated:

> [The] parties agree that this claim was not submitted under a contract theory, but rather as a tort claim. Thus, again, we do not address whether, or under what circumstances, the breach of such an express implied-in-fact covenant gives rise to a contract claim in the employment context, nor in this contract specifically.[1]

The court of appeals did not rule on whether contract claims exist, because the appeals were from the trial court's determinations that Colorado recognizes claims, *in tort* for breach of the covenant of good faith and fair dealing in the employment context.[2] The court of appeals recognized that it was unnecessary to decide the contract issue. BFI submits that this court has ruled on an issue that should have been decided, if at all, by the court of appeals.

In its grant of certiorari, this court framed the covenant issue as:

> Whether the court of appeals erred in reversing the trial court's finding that the facts of the present case gave rise to a claim *in tort* for breach of the express covenant of good faith and fair dealing. (Emphasis added.)

There was no suggestion, based upon the trial court's rulings, the issues before the court of appeals and its decisions, and the briefs filed by the parties at every stage of the proceedings, that this court was going to consider whether Colorado would adopt a claim, *in contract,* for breach of a covenant of good faith and fair dealing in the employment context.

---

[1] This holding was incorporated in Mr. Castillo's decision.

[2] However, the court of appeals has consistently rejected contract covenant claims, express or implied, in the employment context.

In this court, BFI relegated its "discussion" of any contract issue to two footnotes in its answer brief. (Respondent's Answer Brief, nos. 2 and 10.) In those footnotes, BFI listed just a few of the many Colorado cases that reject contract claims, express or implied, for breach of a covenant of good faith and fair dealing in the employment context. Those footnotes also indicated that neither the parties, the trial court, nor the court of appeals, understood the issue on appeal to be whether such a claim exists in contract.

Also, BFI had no opportunity to appeal the issue of whether any such claim exists in contract, because the court of appeals expressly declined to rule on this issue. How could BFI argue the existence or merits of a claim that the court of appeals specifically stated that it was not deciding?

BFI, relying upon the court of appeals' decisions and the covenant issue framed in the grant of certiorari, also did not have an opportunity to address a contract claim *as applied to the facts of these cases.* BFI confined its record references and fact discussions to a comparison of its conduct to the facts of those few cases where courts have found the exceptional circumstances justifying a *tort claim.* BFI did not have an opportunity to discuss its conduct or the statement of "fairness" in these cases, in the context of contract claims. BFI submits that there are many important factual reasons why its general statements of "fairness," including when and the circumstances under which the statements were made, do not create contract liability.

Courts have consistently held that express or implied statements of fairness or good faith relate to the *manner* in which the parties carry out the terms of a contract, but do not create an additional contract, especially one that would be at odds or override the underlying contract itself.

BFI did not have an opportunity to argue (nor does this court's decision even mention) the Colorado precedent which has rejected contract covenant claims in the employment context. *See Schur v. Storage Technology Corporation*, 878 P.2d 51, 55 (Colo. App. 1994) (even a written promise of fair treatment in an employee handbook does not alter the at-will nature of the employment relationship, nor does it create a contract claim for its alleged breach); *Corporon v. Safeway Stores, Inc.*, 708 P.2d 1385, 1390 (Colo.App. 1985) (no fair dealing claim in the employment context). Nor does this court's decision discuss or mention Colorado federal cases (applying Colorado *employment and contract law)*, which also squarely reject claims based upon statements of "fairness" as too vague to be enforceable as contracts. *See Johnson v. Cadillac Plastic Group, Inc.*, 908 F.Supp. 847, 851 (D. Colo. 1995) (implied contract may be decided as matter of law if alleged promises are nothing more than "vague assurances"); *Vasey v. Martin Marietta Corp.*, 29 F.3d 1460, 1466, n. 2 (10th Cir. 1994) (rejecting express covenant claims because employer's statements concerning fair treatment were unenforceable, vague assurances).

And on February 6, 1997, the court of appeals announced its decision in *Soderlun, et. al. v. Public Service Company of Colorado* (No. 95 CA 0458). In that case, the court of appeals held that general oral statements of length of employment and even language of fairness in the company's code of business conduct, did not create a separate contract. The court of appeals held that such "covenants" do not limit an employer's right to discharge without cause, unless there is an express or implied promise, independent of the covenant of good faith itself, restricting *that* right, i.e., specifically directed at the length of employment or conditions of termination. The court concluded that general written or oral statements of good faith or fairness are too vague to be enforceable.

Under the court of appeals decision in *Soderlun* and the facts of these cases (the statements of "fairness") BFI should prevail on any contract covenant claims.

The petitioners exclusively argued and stated at every level of these proceedings that the facts of these cases gave rise to a *tort claim* based upon cases such as *K Mart Corp. v. Ponsock,* 732 P.2d 1364 (Nev. 1987) and *Wilder v. Cody County Chamber of Commerce,* 863 P.2d 211 (Wyo. 1994). There is a reason why petitioners pursued a tort claim: the Colorado courts, for well over a decade, have repeatedly and consistently rejected contract claims of "fairness," express or implied, in the employment context.

BFI does not intend criticism of this court. But it honestly believes that it did not have an opportunity to address the wholly new claim that this court has recognized, and, at a minimum, that this issue should have been decided in the first instance by the court of appeals.[3]

BFI reads this court's decision as engrafting a "fairness" requirement on all employment decisions in Colorado. This court's decision means that even if an employer follows its written policies and procedures, it is still exposed to an additional contract claim for a breach of "fairness," that may be created by an innocent, general statement that has no relationship whatsoever to its policies or procedures (vacation, sick time, termination, and the like). In other words, an employer may precisely follow its policies and procedures, but a jury is allowed later to decide that those policies and procedures are not "fair."

Also, under this court's decision, no Colorado employer dare write or utter the word "fair" or any word like it, because this will subject the employer to a lawsuit and potential exposure for emotional distress damages, regardless of whether it has followed its policies and procedures. No employer should have to post a sign over its door: "We are not fair. Do not work here if you think we will be fair to you."

---

[3] BFI believes that if this court's grant of certiorari had been phrased in terms relating to at-will employment or whether a contract claim exists for breach of an express or implied covenant of good faith and fair dealing in the employment context, employers or their organizations would have asked permission to file *amicus* briefs. This court has announced a new claim that impacts thousands of Colorado employers.

In sum, BFI requests a hearing on the issue of whether Colorado should recognize a claim *in contract* for breach of the covenant of good faith and fair dealing in employment cases, and whether the *facts of these* cases support this claim. This court's opinion does not discuss why such a claim is necessary, or how the facts of these cases differ from those in *Soderlun, Schur, Corporon,* or any other cases holding that statements of "fairness" are too vague to support a claim.[4]

Or, BFI asks that this court remand the contract claim issue to the court of appeals. This would be consistent with this court's remand of the "front pay" or "lost future wages" issue to the court of appeals. For the same reason that this court remanded Mr. Decker's case to the court of appeals to determine whether the contract damage award was proper, this court should also remand to the court of appeals, the question of whether contract claims exist for breach of the covenant of good faith and fair dealing in the employment context.[5]

---

[4] Also, this is not a case where the petitioners were left without a remedy. The juries' findings that BFI breached the "phantom" policy (a contract claim) were affirmed on appeal.

[5] This court also found that the jury's award of $80,000 in emotional distress damages to Mr. Decker was linked *solely* to his claim for breach of the covenant of good faith and fair dealing. (Opinion, pp. 28-29.) If this court on rehearing, or the court of appeals on remand, determines that Colorado should not or does not recognize a claim in contract for breach of the covenant of good faith and fair dealing in the employment context, then the award of emotional distress damages must fall.

## The Contract Covenant Claim

This court has stated that BFI did not object to and agreed to try the contract covenant claims. Because of the wording of the grant of certiorari, and the express determination by the court of appeals that it was not deciding whether such claims exist in contract, BFI did not discuss its objections to the contract covenant claims.

BFI repeatedly asserted that the covenant claims were not cognizable under Colorado law, in either tort or contract. BFI requested Rule 12(b)(5) dismissals of the covenant claims. (Decker, Vol. 1, Folio 138; Castillo, Vol. 1, Folio 201.) BFI also filed motions for summary judgment on the covenant claims. (Decker, Vol. 1, Folio 153; Castillo, Vol. 1, Folio 47.) BFI also requested dismissal of the covenant claims at the directed verdict stages (Decker, Vol. 6, p. 75; Castillo, Vol. 6, p. 141), and at the instruction phases of the trials. (Decker, Vol. 5, pp. 78 and 83; Castillo, pp. 126-127.)

This court correctly noted that there was "confusion" created by the trial court's instructions to the juries, inasmuch as the trial court had determined to treat the covenant claims as tort claims. However, this court erred in finding that BFI agreed to try contract covenant claims. BFI objected to any covenant claims, period, whether in tort or contract, commencing with its very first pleadings which stated that the "claims" did not state claims for relief.

Nor did BFI consent to the submission of covenant claims to the juries. Once the trial court had determined to instruct the juries on the covenant claims, *in tort*, it was not incumbent upon BFI to explain to the juries in its closing arguments that the trial court's instructions were improper.

In its opinion this court states:

> (T)he trial court stated its view that Castillo's claim for breach of the covenant of good faith and fair dealing was a tort claim. Nevertheless, the parties never amended their pleadings to reflect such distinction and never suggested to the juries that some of the claims were tort claims. (Opinion, p. 11.)

BFI had stated clearly in its pleadings that no covenant claim existed, in tort or contract. What possible amendment could BFI have made? Also, what possible or legally permissible argument could or should BFI have made to the juries about the legal basis of the covenant claims?

This court's opinion also states:

> While the issues framed for appeal properly sought review of the trial court's implied conclusion that a tort claim for breach of express covenant of good faith and fair dealing exists in Colorado, in determining what effect the contrary conclusion reached by the court of appeals might have on the jury verdicts, we consider those verdicts in light of the manner in which the cases were tried. (Opinion, p. 11.)

There was nothing "implied" by the trial court. The trial court determined that the claims were *tort claims*. It said so specifically. In addition, the fact that the trial court instructed the juries on punitive damages eliminates any possibility that the trial court "implied" that the covenant claims were tort claims.

Finally, the "light of the manner in which the cases were tried," was a tort environment.

The record in this case clearly demonstrates that the trial judge and the parties to the lawsuits agreed that the covenant claims were treated as tort claims - not contract claims. The "manner" in which the cases were tried was made obvious in the summation in Mr. Decker's case, in which this argument was made:

> (BFI's conduct is) despicable . . . I'm asking you to hurt BFI and make it sting. (Decker, Vol. 5, pp. 106-107, 125.)

Obviously, this type of argument would draw a sustainable objection in a contract lawsuit. Such argument, however, is probably proper in a tort lawsuit. BFI did not object to this argument because the trial court, over BFI's objection, submitted the covenant claims to the juries as tort claims.

Respectfully submitted this 10 day of February, 1997.

McNAMARA LAW FIRM, P.C.

By: John N. McNamara
John N. McNamara, Jr., No. 2471
1660 Seventeenth Street, Suite 100
Denver, Colorado 80202
Telephone: (303) 572-1660

BAKER & HOSTETLER

By: Kitty Illegible
James A. Clark, No. 1956
Kathryn A. Elzi, No. 10630
303 East Seventeenth Avenue,
Suite 1100
Denver, Colorado 80203
Telephone: (303) 861-0600

ATTORNEYS FOR RESPONDENT
BROWNING-FERRIS INDUSTRIES
OF COLORADO, INC.

## CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of February, 1997, a true and correct copy of the foregoing **RESPONDENT'S PETITION FOR REHEARING** was served on the following by placing the same in the United States mail, addressed to:

Stefan Kazmierski, Esq.
769 W. Littleton Boulevard
Littleton, Colorado 80120-2337

Barry D. Roseman, Esq.
899 Logan Street
Suite 203
Denver, Colorado 80203

/s/ Illegible

## APPENDIX J

SUPREME COURT, STATE OF COLORADO
CASE NO. 95SC252 & 95SC253
CERTIORARI TO THE COLORADO
COURT OF APPEALS,
93CA1427 & 93CA1428
DISTRICT COURT, ADAMS COUNTY,
92CV185 & 92CV569

---

**ORDER OF COURT**

---

95SC252

THOMAS H. DECKER,

Petitioner, (Filed Feb. 24, 1997)

v.

BROWNING-FERRIS INDUSTRIES OF
COLORADO, INC.,

Respondent.

* * * * * * *

95SC253

JOSE CASTILLO,

Petitioner,

v.

BROWNING-FERRIS INDUSTRIES OF
COLORADO, INC.,

Respondent.

---

Upon consideration of the Respondent's Petition for Rehearing filed in the above cause, and now being sufficiently advised in the premises, IT IS THIS DAY ORDERED that said Petition for Rehearing shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, FEBRUARY 24, 1997.

cc:

Stefan Kazmierski
769 W. Littleton Blvd.
Littleton, CO 80120-2337

[SEAL]

John N. McNamara, Jr.
James D. Kilroy
McNAMARA LAW FIRM, P.C.
1660 17th Street, Suite 100
Denver, CO 80203

James A. Clark
Kathryn A. Elzi
BAKER & HOSTETLER
303 East 17th Avenue, Suite 1100
Denver, CO 80203

Barry D. Roseman
899 Logan Street, Suite 203
Denver, CO 80203

Honorable John J. Vigil
Adams County District Court
1931 East Bridge Street
Brighton, CO 80601

Clerk of the District Court
Adams County District Court
1931 East Bridge Street
Brighton, CO 80601

Patrick H. Stanford, Clerk
Colorado Court of Appeals

## APPENDIX K

Russell R. DECKER, Petitioner,

v.

BROWNING-FERRIS INDUSTRIES OF COLORADO, INC., Respondent,

No. 96SC303.

Supreme Court of Colorado,

En Banc.

Oct. 27, 1997.

Rehearing Denied Dec. 8, 1997.

Bridgers & Kazmierski, L.L.C., Stefan Kazmierski, Englewood, for Petitioner.

McNamara Law Firm, P.C., John N. McNamara, Jr., James D. Kilroy, Denver, Baker & Hostetler, L.L.P., James A. Clark, Kathryn A. Elzi, Denver, for Respondent.

Justice MARTINEZ delivered the Opinion of the Court.

In *Russell Decker v. Browning-Ferris Industries of Colorado, Inc.*, No. 94CA1827, slip op. at 1-2 (Colo.App. Mar. 14, 1996) (not selected for official publication), the court of appeals determined, relying on the related case of *Thomas Decker v. Browning-Ferris Industries of Colorado, Inc.*, 903 P.2d 1150 (Colo.App.1995), that no tort cause of action exists in Colorado for the breach of an express covenant of good faith and fair dealing in the employment context. The court of appeals vacated the economic, noneconomic, and exemplary damage awards and remanded the case to the trial court for a new trial on the issue of damages.

We granted certiorari to determine whether the court of appeals erred in reversing the trial court's finding that the facts of the present case gave rise to a claim in tort for breach of the express covenant of good faith and fair dealing.[1] However, we held briefing in abeyance pending the disposition of the consolidated case of *Thomas H. Decker v. Browning-Ferris Industries of Colorado* and *Castillo v. Browning-Ferris Industries of Colorado,* 931 P.2d 436 (Colo.1997) (*Thomas Decker*) (declining to recognize a tort claim for a breach of a covenant of good faith and fair dealing in employment context).

Our decision in *Thomas Decker* is dispositive of this case as well. We now affirm in part, reverse in part, and remand to the court of appeals with instructions to vacate the exemplary damages award and reinstate the economic and noneconomic damage awards.

## I.

In 1985, Tony Vagneur, a district manager at Browning-Ferris Industries of Colorado (BFI), hired Russell R. Decker to perform trash removal duties in BFI's Aspen district. BFI subsequently promoted Decker to the position of "route supervisor," which he held for approximately six years.

---

[1] In *Thomas Decker,* we granted certiorari to review two issues:

1. Whether the court of appeals erred in reversing the trial court's finding that the facts of the present case gave rise to a claim in tort for breach of the express covenant of good faith and fair dealing.

2. Whether the court of appeals erred in remanding this matter to the trial court for a new trial on damages after affirming the jury verdict of liability against BFI.

In January 1991, BFI assigned Jerry VanderVelde to the Aspen district to replace Vagneur. In April 1991, VanderVelde terminated several workers, including Decker, for allegedly falsifying their time cards.[2] In response, Decker sued BFI, claiming that BFI failed to follow its progressive disciplinary policy, breached an express covenant of good faith and fair dealing, and wrongfully discharged Decker in retaliation for filing a workers' compensation claim.[3]

Using special verdict forms, the jury determined that BFI had a progressive disciplinary policy, that it breached its policy, and that it breached the express covenant of good faith and fair dealing. Although the jury did not award any damages to Decker for the breach of the progressive disciplinary policy, it did award $115,000.00 in economic damages and another $5,000.00 in non-economic damages for the breach of the covenant of good faith and fair dealing. The jury also found beyond a reasonable doubt that BFI acted in a willful and wanton manner and thus awarded Decker exemplary damages.[4]

---

[2] VanderVelde asserted that Decker and his work partner improperly "punched in" each others' time cards when the other was not present.

[3] The retaliatory claim is not at issue here.

[4] The trial court reduced the exemplary damages award from $380,000.00 to $120,000.00.

## II.

Thomas Decker controls the disposition of this case because of the substantial similarities in facts, claims, jury instructions, and verdicts.[5] In *Thomas Decker,* BFI terminated Thomas Decker and Jose Castillo for allegedly working too slowly. *See Thomas Decker,* 931 P.2d at 438. Decker and Castillo each filed a separate wrongful termination claim against BFI alleging that he was terminated in violation of a progressive disciplinary policy and that BFI breached an express covenant of good faith and fair dealing. *Id.* at 438-39. In each action, the jury returned a verdict in favor of the plaintiff and awarded economic, noneconomic, and exemplary damages. *Id.* at 439. BFI appealed both cases. The court of appeals reversed both cases, holding that no tort claim for a breach of an express covenant of good faith and fair dealing existed in the employment context, and remanded for a new trial on damages. *Id.* at 440.

---

[5] This case and the two consolidated cases in *Thomas Decker,* which were tried by the same attorneys before the same district court judge, involved allegations of wrongful discharge in violation of a progressive disciplinary policy and breach of an express covenant of good faith and fair dealing. The judge limited the juries' calculations of economic damages to "back pay, loss of future pay and loss of benefits" in all three actions. The juries received substantially similar instructions on the breach of covenant of good faith and fair dealing claim and determined that "BFI's breach of the covenant of good faith and fair dealing was attended by circumstances of willful and wanton conduct."

We granted certiorari and consolidated both cases for appeal. We declined to recognize the existence in Colorado of a tort claim for a breach of an express covenant of good faith and fair dealing in the employment context, and we determined that an express covenant of good faith and fair dealing modified the employment contract. *Id.* at 446. We held that claims of a breach of the express covenant "sound in contract, not in tort," vacated the exemplary damages, and permitted the economic and noneconomic damages to stand. *Id.* at 441-48.[6]

In *Thomas Decker,* the plaintiffs alleged that their discharges violated an express covenant of fair treatment, as well as the terms of a progressive discipline policy. Those contentions formed the factual basis for breach of contract actions. The juries ultimately concluded that the promises had been breached and awarded damages.

Although we recognize that the terms and conditions of an employment contract may be modified, neither in *Thomas Decker* nor here do we abrogate Colorado's at-will employment doctrine. In Colorado, employment is generally at-will and an employer may terminate an employee

---

[6] We permitted noneconomic damages for "inconvenience and emotional stress" to stand because the jury found that the breach was accompanied by willful and wanton conduct. *See Thomas Decker*, 931 P.2d at 448 ("Damages for 'mental suffering' are recoverable on a breach of contract claim when the breach is accompanied by willful and wanton conduct and when the damages are a natural and proximate consequence of such conduct.") (citing *Trimble v. City and County of Denver*, 697 P.2d 716, 731 (Colo.1985)).

"without cause and without notice." *See Crawford Rehabilitation Services v. Weissman,* 938 P.2d 540 at 546 (Colo.1997).[7]

Here, BFI now asks us to overrule *Thomas Decker*. We decline to do so. In the alternative, BFI asserts that our decision in *Thomas Decker* is inapposite because the *Thomas Decker* special verdict forms and the jury instructions differ from those used in the present case. Specifically, BFI contends that the damage sections of the special verdict forms used in *Thomas Decker* did not require the jury to distinguish between the progressive disciplinary damages and the covenant of good faith and fair dealing damages – whereas here, the special verdict form required the jury to reach separate damage determinations with respect to each of Decker's claims for relief. BFI argues that the differences compel this court to disregard the *Thomas Decker* decision and refrain from utilizing the economic damages awarded under the "tort" rubric to support a contract damage claim.

In *Thomas Decker*, the language of the pleadings, instructions, and verdict forms established the claims as contract claims. The instructions related only to contract theories of recovery. The jury verdict forms did not require any distinction between the claims regarding whether damages for lost income, inconvenience, and emotional stress should be awarded. *See Thomas Decker,* 931 P.2d at 446. Damages for inconvenience and emotional stress were allowed if the jury found willful and wanton conduct.

---

[7] Modifications of at-will employment have been described as implied-in-law and implied-in-fact. "An implied-in-law term arises from a duty imposed by law where the contract itself is silent. . . . An implied-in-fact contract term, on the other hand, is one that is inferred from the statements or conduct of the parties." *Wagenseller v. Scottsdale Mem'l Hosp.*, 147 Ariz. 370, 381, 710 P.2d 1025, 1036 (1985). The modification we recognize here and in *Thomas Decker* could be characterized as implied-in-fact.

The record here reveals that the pleadings, jury instructions, and verdict forms are identical in all but one respect to those in *Thomas Decker*. The jury in this case was provided with a verdict form permitting it to find a "breach of employment contract for BFI's failure to follow its progressive disciplinary policy," in addition to the verdict for breach of the covenant of good faith and fair dealing. The jury was also provided with an instruction that it was to award damages only once for the same injuries. In *Thomas Decker,* we were satisfied that the verdict for breach of the covenant of good faith and fair dealing was a finding of a breach of contract. We reach the same conclusion here.

Although the jury awarded all economic and non-economic damages under the rubric designated for the breach of the covenant of good faith and fair dealing, the jury also specifically found that BFI failed to follow its progressive disciplinary policy. The jury did not award damages on the failure of BFI to follow its progressive disciplinary policy, but only on the breach of good faith and fair dealing. However, the jury was specifically instructed to award damages on only one claim of relief. The jury's specific recognition that there was a breach of a disciplinary policy coupled with the trial court's instruction limiting available damages indicates that, as in *Thomas Decker,* we cannot discern whether the awards for economic damages were based on the breach of disciplinary policy or the breach of the covenant of good faith and fair dealing. *Thomas Decker,* 931 P.2d at 447. The award for noneconomic damages for inconvenience and emotional stress were based on findings of willful and wanton conduct as they were in *Thomas Decker. See id.* at 447-48.

We recognized in *Thomas Decker* that "the claim for breach of the progressive disciplinary policy and the claim for breach of covenant of good faith and fair dealing were [both] pled, tried, and found by the jury to be breaches of an express contractual obligation." *Id.* at 447. We therefore affirmed the juries' awards of economic damages to Decker and Castillo because the juries' calculations of economic damages were limited to "back pay, loss of future pay and loss of benefits." *Id.*

Here, as in *Thomas Decker,* the claim for a breach of an express covenant of good faith and fair dealing was "pled, tried, and found" by the jury to be a breach of an express contractual obligation. *Id.* Here, as in *Thomas Decker,* we accept the finding of the jury of a breach of an express contractual obligation without addressing the elements of such a claim or the proof necessary to sustain the claim. These issues are not before us and were not before us in *Thomas Decker.* In addition, the jury's calculation of economic damages was limited to "back pay, loss of future pay and loss of benefits." *Id.* We conclude that the economic damage award is appropriate because it was "designed to put the wrongfully discharged employee in the same position he . . . would have been in had the employer not breach[ed] the employment contract." *Id.* We also conclude that the noneconomic damages for inconvenience and emotional stress are appropriate because the jury found the breach of the covenant of good faith and fair dealing to be willful and wanton. *See Trimble,* 697 P.2d at 731.

We emphsize [sic] here, as we did in *Thomas Decker,* that

> the law of torts and the law of contracts reflect different policies and, therefore, recognize different remedies. The law of contracts does not seek to compel performance of a contract by punishing a breach, but rather to compensate the promise for losses sustained as a result of the breach. The law of torts is premised upon legal duties imposed by law. Breach of such legal duties can, in certain circumstances, justify the imposition of exemplary damages in order to punish the defendant and deter others from similar conduct in the future.

*Thomas Decker,* 931 P.2d at 446 (citing *Mortgage Finance, Inc. v. Podleski,* 742 P.2d 900 (Colo.1987) (citations omitted)). We therefore conclude, as we did in *Thomas Decker,* that the award for punitive damages must be vacated because it is not recoverable under a breach of contract claim.

## III.

We decline to overrule our recent decision in *Thomas Decker.* We affirm the court of appeals' determination to vacate the award of exemplary damages and we reverse the court of appeals' judgment insofar as it sets aside the jury verdicts awarding economic and noneconomic damages. We therefore affirm in part and reverse in part and remand to the court of appeals with instructions to vacate the award of exemplary damages and to reinstate the economic and noneconomic damage awards.

---

**Supreme Court of Colorado**
STATE JUDICIAL BUILDING
2 EAST 14TH AVENUE
DENVER, COLORADO 80203
(303) 861-1111

MAC V. DANFORD CLERK OF COURT
COURT ADMINISTRATOR

December 8, 1997

**Case No. 96SC303**

**Decker v. Browning Ferris**

The opinion has been modified, and, as modified, the petition for rehearing is denied. Therefore, attached are the copies of modified pages 6 through 12. Please substitute these pages for the like pages in the opinion announced on October 27, 1997.

Also attached are the redlined pages indicating the changes that were made.

MAC V. DANFORD
Clerk of the Supreme Court

/s/ Illegible
Deputy Clerk

:vk
Attachments

---

good faith and fair dealing existed in the employment context, and remanded for a new trial on damages. *Id.* at 440.

We-granted certiorari and consolidated both cases for appeal. We declined to recognize the existence in Colorado of a tort claim for a breach of an express covenant of good faith and fair dealing in the employment context, and we determined that ~~a breach of~~ an express covenant of good faith and fair dealing ~~is equivalent to a breach of contract claim~~*modified the employment contract.* *Id.* at 446. ~~That is, if an employer makes an express promise to deal with an employee in a fair manner, and the employer later breaks its promise, the employee has a cause of action for breach of an express promise of fair and equitable treatment. Id. at 447-48.~~ We held that *claims of a breach of the express covenant* "~~[s]uch claims~~ sound in contract, not in tort," vacated the exemplary damages, and permitted the economic and noneconomic damages to stand. *Id.* at 441-48.[6]

*In Thomas Decker, the plaintiffs alleged that their discharges violated an express covenant of fair treatment, as well as the terms of a progressive discipline policy. Those contentions formed the factual basis for breach of contract actions.*

---

[6] *We permitted noneconomic damages for "inconvenience and emotional stress" to stand because the jury found that the breach was accompanied by willful and wanton conduct. See Thomas Decker, 931 P.2d at 448 ("Damages for 'mental suffering' are recoverable on a breach of contract claim when the breach is accompanied by willful and wanton conduct and when the damages are a natural and proximate consequence of such conduct.") (citing Trimble v. City and County of Denver, 697 P.2d 716, 731 (Colo. 1985)).*

*The juries ultimately concluded that the promises had been breached and awarded damages.*

*Although we recognize that the terms and conditions of an employment contract may be modified, neither in Thomas Decker nor here do we abrogate Colorado's at-will employment doctrine. In Colorado, employment is generally at-will and an employer may terminate an employee "without cause and without notice." See Crawford Rehabilitation Services v. Weissman, 938 P.2d 540 at 546 (Colo. 1997).*[7]

Here, BFI now asks us to overrule *Thomas Decker.* We decline to do so. In the alternative, BFI asserts that our decision in *Thomas Decker* is inapposite because the *Thomas Decker* special verdict forms and the jury instructions differ from those used in the present case. Specifically, BFI contends that the damage sections of the special verdict forms used in *Thomas Decker* did not require the jury to distinguish between the progressive disciplinary damages and the covenant of good faith and fair dealing damages – whereas here, the special verdict form required the jury to reach separate damage determinations with respect to each of Decker's claims for relief. BFI argues that the differences compel this court to disregard the *Thomas Decker* decision and refrain from utilizing the economic damages awarded under the "tort" rubric to support a contract damage claim.

---

[7] *Modifications of at-will employment have been described as implied-in-law and implied-in-fact. "An implied-in-law term arises from a duty imposed by law where the contract itself is silent. . . . An implied-in-fact contract term, on the other hand, is one that is inferred from the statements or conduct of the parties." Wagonseller v. Scottsdale Mem'l Hosp., 147 Ariz. 370, 381, 710 P.2d 1025, 1036 (1985). The modification we recognize here and in Thomas Decker could be characterized as implied-in-fact.*

In *Thomas Decker,* the language of the pleadings, instructions, and verdict forms established the claims as contract claims. ~~and that t~~ The instructions related only to contract theories of recovery. *The jury verdict forms did not require any distinction between the claims regarding whether damages for lost income, inconvenience, and emotional stress should be awarded. See Thomas Decker, 931 P.2d at 446. Damages for inconvenience and emotional stress were allowed if the jury found willful and wanton conduct.*

The record here reveals that the pleadings, jury instructions, and verdict forms are identical in all but one respect to those in *Thomas Decker.* The jury in this case was provided with a verdict form permitting it to find a "breach of employment contract for BFI's failure to follow its progressive disciplinary policy," in addition to the verdict for breach of the covenant of good faith and fair dealing. The jury was also provided with an instruction that it was to award damages only once for the same injuries. In *Thomas Decker,* we were satisfied that the verdict for breach of the covenant of good faith and fair dealing was a finding of a breach of contract. We reach the same conclusion here.

Although the jury awarded all economic and non-economic damages under the rubric designated for the breach of the covenant of good faith and fair dealing, the jury also specifically found that BFI failed to follow its progressive disciplinary policy. The jury did not award damages on the failure of BFI to follow its progressive disciplinary policy, but only on the breach of good faith and fair dealing. However, the jury was specifically instructed to award damages on only one claim of relief. ~~In the present case, t~~The jury's specific recognition that there was a breach of a disciplinary policy coupled with the trial court's instruction limiting available damages indicates that, as in *Thomas Decker,* we cannot discern whether the awards for economic damages were based on the breach of disciplinary policy or the breach of the covenant of good faith and fair dealing. *Thomas Decker,* 931 P.2d at 447. *The award for noneconomic damages for inconvenience and emotional stress were based on findings of willful and wanton conduct, as they were in Thomas Decker. See id. at 447-48.*

We recognized in *Thomas Decker* that "the claim for breach of the progressive disciplinary policy and the claim for breach of covenant of good faith and fair dealing were [both] pled, tried, and found by the jury to be breaches of an express contractual obligation." *Id. at 447.* We therefore affirmed the juries' awards of economic damages to Decker and Castillo because the juries' calculations of economic damages were limited to "back pay, loss of future pay and loss of benefits." *Id.*

Here, as in *Thomas Decker,* the claim for a breach of an express covenant of good faith and fair dealing was "pled, tried, and found" by the jury to be a breach of an express contractual obligation. *Id. Here, as in Thomas Decker, we accept the findings of the jury of a breach of an express contractual obligation without addressing the elements of such a claim or the proof necessary to sustain the claim. These issues are not before us and were not before us in Thomas Decker.* In addition, the jury's calculation of economic damages was limited to "back pay, loss of future pay and loss of benefits." *Id.* We conclude that the economic damage award is appropriate because it was "designed to put the wrongfully discharged employee in the same position he . . . would have been in had the employer not breach[ed] the employment contract." *Id. We also conclude that the noneconomic damages for inconvenience and emotional stress are appropriate because the jury found the breach of the covenant of good faith and fair dealing to be willful and wanton. See Trimble, 697 P.2d at 731.*

*We emphasize here, as we did in Thomas Decker, that*

> *the law of torts and the law of contracts reflect different policies and, therefore, recognize different remedies. The law of contracts does not seek to compel performance of a contract by punishing a breach, but rather to compensate the promise for losses sustained as a result of the breach. The law of torts is premised upon legal duties imposed by law. Breach of such legal duties can, in certain circumstances justify the imposition of exemplary damages in order to punish the defendant and deter others from similar conduct in the future.*

*Thomas Decker, 931 P.2d at 466 (citing Mortgage Finance, Inc. v. Podleski, 742 P.2d 900 (Colo. 1987) (citations omitted)). We therefore conclude, as we did in Thomas Decker, that the award for punitive damages must be vacated because it is not recoverable under a breach of contract claim.*

## III.

We decline to overrule our recent decision in *Thomas Decker.* We affirm the court of appeals' determination to vacate the award of exemplary damages and we reverse the court of appeals' judgment insofar as it sets aside the jury verdicts awarding economic and noneconomic damages. We therefore affirm in part and reverse in part and remand to the court of appeals with instructions to vacate the award of exemplary damages and to reinstate the economic and noneconomic damage awards.

## APPENDIX L

Thomas H. **DECKER,** Plaintiff-Appellee,

v.

**BROWING**-FERRIS INDUSTRIES OF
COLORADO, INC., Defendant-Appellant.

No. 93CA1427.

Colorado Court of Appeals,
Div. **IV.**

Jan. 12, 1995.

Rehearing Denied March 16, 1995.
Certiorari Granted Oct. 2, 1995.
Cross-Petition for Writ of
Certiorari Denied Oct. 2, 1995.

Stefan Kazmierski, Littleton, for plaintiff-appellee.

John N. McNamara, Jr., P.C., John N. McNamara, Baker & Hostetler, James A. Clark, Kathryn A. Elzi, Denver, for defendant-appellant.

Feiger, Collison & Killmer, P.C., Gilbert M. Roman, Denver, for amicus curiae Nat. Employment Lawyers Ass'n.

Opinion by Judge CASEBOLT.

In this wrongful termination of employment suit, defendant, Browning-Ferris Industries of Colorado, Inc. (BFI), appeals the judgment entered upon a jury verdict awarding damages to plaintiff, Thomas H. Decker. We affirm in part and reverse in part.

Decker was employed by BFI, beginning in 1985, first as a crew member and then as a trash truck driver in its Aspen, Colorado, location. In early 1991, a new general manager for that location was installed. In August of 1991, the new general manager for BFI fired Decker, allegedly for working too slowly.

Decker brought this wrongful termination suit against BFI asserting that he had been discharged in violation of an alleged progressive discipline policy and that BFI had breached an express covenant of good faith and fair dealing in terminating his employment. Decker sought damages under a contract claim, tort damages for breach of the express covenant of good faith, and punitive damages under the alleged tort claim.

At trial, BFI stipulated that it promised fair treatment to its employees, but denied any impropriety in its treatment of Decker.

After trial, the jury awarded Decker $600,000 for lost income, $80,000 in noneconomic damages for breach of the good faith covenant, and $680,000 in punitive damages predicated upon breach of the covenant.

## I.

BFI's first contention is that the trial court erred by refusing to admit evidence, acquired after Decker was terminated, which allegedly established that Decker lied about his criminal record on his employment application. We disagree.

In 1984, Decker was charged in Texas with a misdemeanor count of possession of cocaine. Under a deferred prosecution, Decker entered a plea of guilty to the charge;

however, he successfully completed the deferred prosecution period, the guilty plea was withdrawn, the misdemeanor charge was dismissed, and his record was expunged, all prior to submitting his employment application to BFI.

BFI's employment application asked whether Decker had "ever been convicted of a felony or a misdemeanor involving moral turpitude (e.g. theft?)" to which Decker answered "No." After BFI terminated Decker's employment, Decker revealed the charge in interrogatory answers and in his deposition, at that time mistakenly characterizing the charge as a felony. BFI denied having any previous knowledge of the charge.

BFI then asserted a defense of fraud in the inducement and filed a motion for summary judgment on Decker's claims based on that defense and upon the doctrine of after-acquired evidence. Decker, in turn, filed a motion in limine seeking to exclude any evidence of this prior charge.

BFI argued that the evidence should be admitted because BFI would not have hired Decker, or would have immediately terminated his employment, had it learned about the drug charge. Accordingly, BFI contended, Decker was not entitled to recover any damages for termination of his employment. BFI also sought admission of the evidence on the grounds that it was relevant to whether Decker had dealt fairly with BFI under the covenant of good faith and fair dealing.

The trial court denied the motion for summary judgment and granted Decker's motion in limine, excluding all after-acquired evidence of the drug charge. It concluded that, in light of the disposition of the charge, Decker had been truthful on his application. In addition, the trial court concluded that, to the extent the evidence was relevant, its probative value was substantially outweighed by the danger of unfair prejudice under CRE 403; hence, the trial court also excluded the evidence for that reason.

A trial court is afforded considerable discretion in passing upon the admission or exclusion of evidence, especially when weighing its probative value and prejudicial effect. Its ruling will not be disturbed on appeal absent an abuse of that discretion. *Hock v. New York Life Insurance Co.,* 876 P.2d 1242 (Colo.1994). A trial court abuses its discretion only when its evidentiary ruling is manifestly arbitrary, unreasonable, or unfair. *People v. Milton,* 732 P.2d 1199 (Colo.1987).

## A.

BFI contends that the proffered evidence was relevant to prove its defense of fraud in the inducement. Under the circumstances at issue, we disagree.

In *Weber v. Colorado State Board of Nursing,* 830 P.2d 1128 (Colo.App.1992), a division of this court concluded that, following successful completion of a deferred judgment, there no longer exists a plea of guilty to a felony and there never existed a judgment of conviction. That reasoning provides persuasive support for the trial court's finding here that Decker did not lie on his application. Such factual findings will not be disturbed on review if, as here, they are supported in the record. *Pomeranz v. McDonald's Corp.*, 843 P.2d 1378 (Colo.1993).

The trial court's determination that Decker was truthful in his application negates the relevance of the evidence for purposes of a fraud in the inducement defense. In order for such a defense to succeed, the evidence must show that Decker made a false statement of fact or concealed a past or present fact which he had a duty to disclose. *See Murray v. Montgomery Ward Life Insurance Co.*, 196 Colo. 225, 584 P.2d 78 (1978).

In light of the Weber holding and the trial court's finding, Decker neither made a false statement, nor was he obligated to disclose the previous charge since it did not constitute a "conviction." Hence, we find no abuse of discretion in the court's ruling relevant to the fraud in the inducement defense.

## B.

BFI next contends that the evidence was relevant under the doctrine of "after-acquired evidence." Again, under these circumstances, we disagree.

The "after-acquired evidence" doctrine stems from the decision in *Summers v. State Farm Mutual Automobile Insurance Co.*, 864 F.2d 700 (10th Cir.1988). There, an employee was fired for generally unsatisfactory work performance. Several years later during the course of discovery in the employee's wrongful termination of employment suit, State Farm discovered that the employee had falsified records. In affirming summary judgment for State Farm, the court held that even though the falsifications discovered after termination of employment were not the original basis for the firing, they were nevertheless admissible in determining what relief, if any, should be afforded the employee. *See also McKennon v. Nashville Banner Publishing Co.*, 9 F.3d 539 (6th Cir.1993), *cert. granted*, ___ U.S. ___, 114 S.Ct. 2099, 128 L.Ed.2d 661 (1994).

The court in *Summers* further held that an employee cannot recover under any theory when the after-acquired evidence would have resulted in termination of the employment relationship if it had been known at the time of the firing.

This doctrine has not been addressed by Colorado appellate courts and we need not decide here whether it should be made part of Colorado law because, under the circumstances of this case, it would not be available. Here, BFI offered an affidavit from its former manager that indicated he would not have hired Decker, or alternatively, would have fired Decker if he had known that Decker had "pled guilty to a felony."

But, as noted above, since the charge against Decker was a misdemeanor, the former manager's affidavit does not establish that the evidence would be admissible on the issue of pleading guilty to a felony. Consequently, we perceive no abuse of discretion by the trial court in refusing to admit the evidence by application of the "after-acquired evidence" doctrine.

### C.

BFI finally asserts that the evidence was relevant on Decker's tort claim of breach of covenant of good faith and fair dealing. We are not persuaded.

In a discussion below, we hold that the trial court erroneously submitted Decker's tort claim to the jury. Accordingly, evidence of Decker's alleged breach of such a covenant, even if established, would be without significance.

Hence, we affirm the trial court's exclusion of this evidence. *People v. Aldrich*, 849 P.2d 821 (Colo.App.1992).

## II.

BFI next contends that the trial court erred in allowing Decker to present testimony regarding the existence and contents of the alleged progressive discipline policy. Again, we perceive no error.

The policy, which BFI claimed did not exist, was purportedly contained in a writing issued to employees. No original or copy of any such policy was introduced at trial, nor was it produced by either side during discovery.

Relying upon *Walker v. Drogmund*, 101 Colo. 521, 74 P.2d 1235 (1937) and *People v. Heckers*, 37 Colo.App. 166, 543 P.2d 1311 (1975), BFI claims that secondary evidence of the contents of a writing must be clear and convincing, a standard not met here. We disagree.

The vitality of *Walker* and *Heckers* for the proposition that "clear and convincing" evidence of the contents of a writing is necessary has been significantly undercut by the adoption of § 13-25-127, C.R.S. (1987 Repl.Vol 6A). That statute establishes a "preponderance of the evidence" burden of proof in civil actions. *See Gerner v. Sullivan*, 768 P.2d 701 (Colo.1989) (preponderance of the evidence standard applies to any civil action except those specified in the statute).

In addition, § 13-25-113, C.R.S. (1987 Repl.Vol. 6A) further supports the admission of the evidence here. That statute provides that, before a party may rely on a document alleged to have been written by the adverse party and subsequently lost or destroyed, that party "shall not be permitted to give evidence of the contents thereof by a competent witness until said party or his agent or attorney first makes an oath to the loss or destruction thereof, and to the substance of the same." Once compliance with the statute has occurred, the evidence is admissible. *See In re Marriage of Fifield*, 776 P.2d 1167 (Colo.App.1989).

Here, BFI does not dispute that Decker presented testimony under oath to the loss or destruction of the alleged document. And, while it argues that the "substance" of the document remains unproven, in our view, that issue is ultimately for determination by the trier of fact.

Under CRE 1004(1), secondary evidence establishing the contents of a writing may be admitted if the original is lost or destroyed, so long as the proponent did not lose or destroy it in bad faith. *See Rodriguez v. Schutt*, 896 P.2d 881 (Colo.App.1994). Here, there was no evidence of any bad faith on the part of Decker in failing to produce the original; rather, BFI simply argued that the policy had never existed.

Once production of the original is excused, a determination to be made by the trial court, secondary evidence of the contents is admissible. As noted in J. Weinstein, Weinstein on Evidence, ¶ 1004(01) (1983):

> Rule 1004 recognizes no degrees of secondary evidence. In other words, once the conditions of Rule 1004 are met, the parties seeking to prove the contents of a writing, photograph, or recording may do so by any kind of secondary evidence ranging from photographs and handwritten copies to oral testimony of a witness whose credibility is suspect. Of course, the opponent may attack the sufficiency of the secondary evidence including the credibility of the witness. This attack, however, goes not to admissibility but to the weight of the evidence and is a matter for the trier of fact to resolve.

Thus, the evidence was admissible under CRE 1004, and the trial court did not abuse its discretion in admitting it.

Second, we disagree with BFI's assertion that reasonable minds could not have found the existence of the progressive discipline policy. There was testimony at trial from several witnesses, including Decker, that the policy existed. In addition, one witness for BFI indicated in a deposition that he believed there was such a policy; although he explained at trial that he had misunderstood which policy was being discussed, the jury could have credited his earlier testimony over his later explanation. Accordingly, the trial court did not err in allowing the jury to determine whether the policy existed. *See Robinson v. Pourde Valley Federal Credit Union,* 680 P.2d 241 (Colo.App.1984).

## III.

Arguing that Colorado does not recognize such a claim in an employment context, BFI next contends that the trial court erred in allowing Decker to present a tort claim for breach of a covenant of good faith and fair dealing. We agree.

We note initially that there was a stipulation by BFI that, although not expressly stated in a writing or otherwise, it promised to treat employees fairly; hence, we deal here only with an express or implied-in-fact covenant of good faith and fair dealing. *See Tuttle v. ANR Freight System, Inc.*, 797 P.2d 825 (Colo.App.1990) (noting that there is no legal difference between an express and implied-in-fact contract). Consequently, we do not address whether, or under what circumstances, an implied-in-law covenant of good faith and fair dealing should or does exist in employment contracts generally.

Further, the parties agree that this claim was not submitted under a contract theory, but rather as a tort claim. Thus, again, we do not address whether, or under what circumstances, the breach of such an express or implied-in-fact covenant gives rise to a contract claim in the employment context, nor in this contract specifically.

The breach of a covenant of good faith and fair dealing does not generally give rise to an independent tort claim. *Friedman v. Colorado National Bank,* 825 P.2d 1033 (Colo.App.1991), *rev'd on other grounds,* 846 P.2d 159 (Colo.1993). *See also Colorado Interstate Gas Co. v. Chemco, Inc.,* 833 P.2d 786 (Colo.App.1991), *aff'd,* 854 P.2d 1232 (Colo.1993) (breach of an implied covenant of good faith and fair dealing implied at law in every contract does not give rise to an independent tort claim); *Centennial Square, Ltd. v. Resolution Trust Co.*, 815 P.2d 1002 (Colo.App.1991) (no tort claim for breach of implied contractual duties).

An exception to this rule prohibiting tort claims has been created by the supreme court in cases involving the breach of this covenant by an insurance carrier. *See Farmers Group, Inc. v. Trimble,* 691 P.2d 1138 (Colo.1984); *Travelers Insurance Co. v. Savio,* 706 P.2d 1258 (Colo.1985). In allowing a tort claim to be presented in that context, the court emphasized the special nature of the insurance contract and the quasi-fiduciary relationship between the insurer and the insured.

Thus far, however, the insurance law context has been the only area in which the supreme court has chosen to recognize a tort duty and, consequently, tort damages for breach of such a covenant. We do not perceive that the employment relationship here, even accepting the presence of an express or implied-in-fact covenant of good faith and fair dealing, implicates the same policy considerations and creates a special relationship similar to the quasi-fiduciary relationship found sufficient to engender a tort claim in *Trimble, supra,* or *Savio, supra.*

Rather, we conclude, as did the California supreme court in *Foley v. Interactive Data Corp.*, 47 Cal.3d 654, 254 Cal.Rptr. 211, 765 P.2d 373 (1988), that, in contrast to the insurer-insured context, no special relationship should be deemed to exist in the usual employment relationship.

The *Foley* court recognized a number of factors which we deem relevant to our analysis. First:

> [A] breach [of contract] in the employment context does not place the employee in the same

> economic dilemma that an insured faces when an insurer in bad faith refuses to pay a claim or to accept a settlement offer within policy limits. When an insurer takes such actions, the insured cannot turn to the marketplace to find another insurance company willing to pay for the loss already incurred. The wrongfully terminated employee, however, can . . . make reasonable efforts to seek alternative employment.

*Foley v. Interactive Data Corp.*, 254 Cal.Rptr. at 234, 765 P.2d at 396.

Second, the role of the employer differs from that of the quasi-public insurance company. An employer does not sell protection to its employees nor does it provide a public service in the same context. *Foley v. Interactive Data Corp., supra.*

Third, there is a fundamental difference in the relationships, since the insured and insurer's interest are often financially at odds. *Foley v. Interactive Data Corp., supra.*

Finally, when the conduct of an employer is particularly egregious, currently available remedies, including claims for outrageous conduct and compensatory damages for mental suffering caused by a willful or wanton breach of contract, offer effective and appropriate methods for obtaining additional relief in wrongful termination cases beyond general contract damages. *See Trimble v. City & County of Denver,* 697 P.2d 716 (Colo.1985); *Churchey v. Adolph Coors Co.,* 759 P.2d 1336 (Colo.1988); *Allabashi v. Lincoln National Sales Corp.,* 824 P.2d 1 (Colo.App.1991).

Moreover, predictability of the consequences of actions related to employment contracts is important to commercial stability. In order to achieve such stability, employers must not fear that every dismissal will necessarily give rise to potential tort recovery. As well, the necessarily flexible but sometimes amorphous standard of "good faith" does not provide a sufficient basis or standard to distinguish readily between cases in which only contract damages should be available and those in which tort damages are warranted.

The majority of cases that have considered whether a covenant of good faith and fair dealing exists in the usual employment relationship, or whether breach of such a covenant creates a tort claim for relief, have held as we do. *See, e.g., Fogel v. Trustees of Iowa College,* 446 N.W.2d 451 (Iowa 1989).

*Stahl v. Sun Microsystems, Inc.,* 775 F.Supp. 1394 (D.Colo.1991), relied upon by Decker, is inapposite. There, in determining motions to dismiss, the court simply noted that the plaintiff could assert a claim based upon an alleged breach of an express covenant of good faith and fair dealing. It did not, however, explicitly state that the plaintiff could pursue a tort action. Rather, the decision is silent concerning the theoretical underpinnings of such a claim.

Likewise, we do not read *Rosales v. AT & T Information Systems, Inc.,* 702 F.Supp. 1489 (D.Colo.1988), or *Price v. Federal Express Corp.,* 660 F.Supp. 1388 (D.Colo.1987), as explicitly recognizing that a tort claim may be brought for breach of such a covenant, be it express or implied. Indeed, the court in *Price* relied heavily upon *Continental*

*Air Lines, Inc. v. Keenan,* 731 P.2d 708 (Colo.1987), a decision of our supreme court that dealt with contractual claims and remedies in the employment context, not tort claims. However, to the extent that *Stahl, supra, Rosales, supra,* and *Price, supra,* can be read to allow a tort claim, we decline to follow them.

Decker further relies upon *Jet Courier Service, Inc. v. Mulei,* 771 P.2d 486 (Colo.1989) to support his claim. That case dealt with a claim by an employer that its employee had breached a duty of loyalty when he solicited customers and co-employees to join his competing enterprise prior to terminating his own employment. The court indicated that a fiduciary duty can exist within the employment relationship under certain circumstances.

Apart from being factually dissimilar, *Mulei, supra,* is inapplicable here because Decker did not allege breach of a fiduciary duty.

Finally, citing *Olsen & Brown v. City of Englewood,* 867 P.2d 96 (Colo.App.1993), Decker asserts that promissory estoppel is a tort claim and that such a theory was expressly recognized to provide a means of recovery in *Continental Air Lines, Inc. v. Keenan, supra.* Thus, Decker reasons, this supports his assertion that he may bring a tort claim for breach of a covenant of good faith. Again, we need not address Decker's contention that promissory estoppel is a tort claim or that he can recover tort damages predicated upon this theory because he did not plead or pursue such a theory at trial.

Accordingly, because we conclude that no cause of action based upon a theory of breach of covenant of good faith and fair dealing may be presented in tort, the jury's award of noneconomic damages cannot stand. Moreover, because our supreme court has held that an award of punitive damages for breach of contract, even a willful and wanton breach, is improper, *Mortgage Finance, Inc. v. Podleski*, 742 P.2d 900 (Colo.1987), that award must likewise be vacated.

Damages for mental suffering may be recovered for willful or wanton breach of a contract when such damages are a natural and proximate consequence of the breach. *Trimble v. City & County of Denver, supra*. Here, however, the trial court did not require the jury to find a willful and wanton breach of contract prior to making such an award; rather, noneconomic damages were allowed on the basis of a simple breach, and willful and wanton conduct was referenced only in connection with the punitive damages claim.

Given the fact that the jury did find willful and wanton conduct, albeit in connection with the punitive damages claim, this error might not, absent other factors, be fatal to the jury's award. However, the error was compounded by the language used in the instructions and the special verdict forms.

The instructions provided that the jury should consider "any noneconomic losses or injuries incurred to the present time or which will probably be incurred in the future, including an amount which will reasonably compensate Mr. Decker for any mental suffering." Similarly, the verdict form provided that the jury should consider "the amount of other damages, if any, incurred by Thomas Decker for inconvenience and emotional stress."

Thus, under the instructions and verdict form, the jury was allowed to evaluate more than "mental suffering." It was allowed to consider noneconomic losses in general, losses which are not compensable in a breach of contract action. In addition, it is impossible to determine what amount, if any, the jury would have awarded as damages for "mental suffering," rather than the combined noneconomic losses.

Accordingly, we vacate the award for noneconomic losses and punitive damages.

## IV.

BFI finally contends that the lost income award of $600,000 must be set aside because it ignores Decker's failure to mitigate damages; is based upon speculative evidence and thus violates the "rule of certainty"; and is counter to basic contract damage law. We conclude that because the cause was submitted to the jury on instructions covering both the cognizable contract claim and the improper tort claim, and it is impossible to discern from the special interrogatory verdict form under which theory the jury awarded economic losses, prejudice to BFI must be presumed, and a new trial as to these damages must be awarded. *See Mosher v. Schumm,* 114 Colo. 441, 166 P.2d 559 (1946) (if jury award cannot be ascertained as being based on valid theory it must be reversed); *Pettingell v. Moede,* 129 Colo. 484, 271 P.2d 1038 (1954) (improper to speculate that jury selected correct theory).

Here, the jury was given one instruction concerning the measure of damages to award for both breach of contract and the asserted tort claim. That instruction further allowed the jury to assess both economic and noneconomic losses, and did not differentiate between the theories asserted, nor the damages which could be recovered under each.

With regard to economic losses, the special verdict form asked the jury only to "state the amount of lost income, if any, suffered by Thomas Decker." Consequently, we cannot discern under which theory lost income was awarded. Therefore, we agree that the award, under these circumstances, cannot stand. *Cf. Cooley v. Big Horn Harvestore Systems, Inc.*, 813 P.2d 736 (Colo.1991) (inasmuch as separate verdict forms permitted jury to enter verdict while emphasizing distinct bases of the two separate claims, no juror confusion created).

## V.

In view of our conclusions above, the liability of BFI for breach of contract has been established; hence, only evidence relating to damages need be considered on retrial. *See Kitto v. Gilbert*, 39 Colo.App. 374, 570 P.2d 544 (1977) (appropriate to restrict scope of retrial when issues are sufficiently distinct such that determination of one issue would not affect resolution of the other and retrial can be accomplished without impeaching the prior verdict). On retrial, Decker may obtain, if requested and proven, damages for mental suffering upon proof of willful or wanton breach of contract. *See Trimble v. City & County of Denver, supra*; CJI-CIV.3d, 30:48 (1991).

Accordingly, the liability determination in favor of Decker on his breach of contract claim is affirmed; the balance of the judgment in favor of Decker is reversed; and the cause is remanded for a new trial on damages consistent with the views expressed in this opinion.

MARQUEZ and ROTHENBERG, JJ., concur.

## APPENDIX M

Linda SODERLUN, Charles A. Rodgers, Paul Blecha, Howard Brooks, Theron Carlson, James Cole, William Durica, Richard Fugier, Robert Hayes, Francis Mathie, Roger Maxwell, William Toomey, Theresa Wise, Calvin Hulsey, Gary D. Reeves, Beverly DeMoss, and Richard Smith, Plaintiffs-Appellants,
and
Joseph Carbone and Jeanette Richey, Plaintiffs-Appellants and Cross-Appellees,
v.
PUBLIC SERVICE COMPANY OF COLORADO, Defendant-Appellee and Cross-Appellant.

No. 95CA0458.

Colorado Court of Appeals,
Div. II.

Feb. 6, 1997.

Rehearing Denied March 6, 1997.
Certiorari Denied Oct. 20, 1997.

Feiger, Collison & King, P.C., Lynn D. Feiger, Diane S. King, Joan M. Bechtold, Denver, for Plaintiffs-Appellants and Cross-Appellees.

Sherman & Howard, L.L.C., James E. Hautzinger, Wendi J. Delmendo, Denver, for Defendant-Appellee and Cross-Appellant.

Opinion by Judge CRISWELL.

Plaintiffs, who are 19 former employees of defendant, Public Service Company (PSC), commenced this action complaining of the termination of their employment with PSC. Each plaintiff asserted that such termination violated the terms of a contract each had with PSC, as well as an express covenant of good faith and fair dealing, and that their reliance upon statements made to them by PSC supervisors gave rise to a promissory estoppel claim. The trial court dismissed the claims of all but two plaintiffs – Joseph Carbone and Jeanette Richey – and it submitted only their claims for breach of contract to a jury which returned verdicts in favor of both. Plaintiffs appeal from the judgments dismissing the other claims asserted, and PSC cross-appeals from the judgments entered on the jury verdicts. We affirm the judgments of dismissal and reverse the judgments entered on the two breach of contract claims.

Prior to plaintiffs' terminations in 1991, PSC had a long history of not laying off employees for economic reasons, and of terminating employees only for inadequate performance. Even during difficult economic times, PSC historically had reduced employee hours or instituted voluntary lay-off programs, rather than involuntarily laying off employees.

However, in mid-1991, PSC established a task force to recommend ways to improve the company's efficiency and profitability. Thereafter, in July 1991, the president of PSC sent a letter to every employee, explaining some of the economic challenges PSC was facing and warning employees that, in order to reduce costs, there was a "very real possibility of a reduction in work force."

Because of the task force's later conclusion that many managers at PSC were supervising relatively few employees, PSC undertook an organizational analysis beginning in the fall of 1991. As a result of that analysis, 100 employees, who were performing functions deemed to be "nonessential," including all but two of the plaintiffs, were laid off. The other two plaintiffs were laid off when two divisions were later consolidated. PSC makes no claim that the services of any plaintiff were unsatisfactory, and plaintiffs do not assert that their lay-offs were discriminatory or otherwise not undertaken out of legitimate economic considerations.

Each plaintiff received at least two weeks' pay upon termination and was allowed to seek other jobs with PSC. In addition, each plaintiff received a severance payment ranging from $10,000 to $37,000.

Each of plaintiffs' claims for wrongful termination was based on three types of evidence: (1) PSC's long-term practice of not laying off employees; (2) PSC's Corporate Code of Business Conduct; and (3) oral statements made by various supervisors from time to time to each plaintiff.

PSC's Corporate Code of Business Conduct, a document every employee was required to read, stated that PSC was committed to "high ethical and moral standards in all we do" and to acting in "honesty, decency, fairness, openness, and trustworthiness." This document also stated that, to uphold confidence in PSC's reputation for integrity, "it is essential that employees, at all times, demonstrate the highest ethical conduct when conducting business with fellow employees. . . ."

In addition, each of the plaintiffs testified that the various oral statements made by PSC supervisors related to their job security. The nature of these remarks varied somewhat, but they consisted, primarily, of references to PSC's history of not engaging in layoffs and of assurances that plaintiffs could continue to work for PSC so long as they were adequately performing their jobs.

In dismissing all of plaintiffs' promissory estoppel and breach of good faith covenant claims, the trial court concluded that the oral and written statements upon which plaintiffs relied as the foundation for these claims were either too indefinite and unspecific to support the claims asserted or that plaintiffs could not reasonably have relied upon those statements as guaranteeing lifetime employment without the possibility of a layoff for economic reasons.

Further, the trial court concluded that, to recover on their breach of contract claims, plaintiffs were obligated to prove that they had provided "special consideration" to PSC to establish these claims. It also concluded that none of the plaintiffs, save Carbone and Richey, had furnished any such special consideration. With respect to these two plaintiffs, the court concluded that their testimony that they each had left higher-paying jobs to work for PSC was sufficient to allow the jury to determine that they had provided special consideration. It was on this basis that the contract claims of these two defendants were submitted for jury determination.

Our review of this record, however, convinces us that the single, significant issue, the resolution of which will be determinative of both plaintiffs' appeal and PSC's cross-appeal, is whether the statements relied upon by plaintiffs as the basis for all of their claims are, as a matter of law, of such a nature as to constitute a legally binding promise upon which plaintiffs could reasonably rely. We conclude that none of the pertinent statements evidence a promissory intent and that none of them was sufficiently definite and specific as to be judicially enforceable.

Absent an explicit understanding to the contrary, every employment relationship is presumed to be "at-will," meaning that either the employer or the employee may terminate the relationship at any time, without notice and without cause. *Martin Marietta Corp. v. Lorenz,* 823 P.2d 100 (Colo.1992).

In *Continental Air Lines, Inc. v. Keenan,* 731 P.2d 708 (Colo.1987), however, our supreme court determined that, under certain circumstances, the existence of such an at-will relationship may be rebutted, and the employee may demonstrate that the termination of the employment relationship is subject to certain restrictions. Such demonstration must consist of proof that the employer made statements to the employee (there, written statements in an employee handbook that the employer had distributed), and that those statements, the circumstances under which they were made, and the employee's reaction thereto, met the requirements of Restatement (Second) of Contracts § 24 (1981) for an offer by the employer and the acceptance of that offer by the employee. Alternatively, even if the requirements for the formation of a contract under Restatement § 24 cannot be shown, the employee may demonstrate that conditions have been imposed upon the at-will relationship, based upon statements made by the employer, by proving the prerequisites for application of doctrine of promissory estoppel under Restatement (Second) of Contracts § 2 and § 90 (1981). *See also Churchey v. Adolph Coors Co.,* 759 P.2d 1336 (Colo.1988).

Aside from the specific principles adopted by the supreme court in this prior jurisprudence, its significance lies in that court's consideration of the employment relationship pursuant to concepts developed by traditional approaches to the common law of contracts. The supreme court has not purported to create any special rules to deal with employee claims of contract breaches. Hence, our analysis of the issues presented here must comport with those traditional contract precepts.

We start that analysis by noting that the contracts that plaintiffs assert were agreed to by PSC are extraordinary. They do not claim only that PSC agreed to limit its authority to terminate their employment to circumstances constituting just cause. Were plaintiffs' claims based upon an alleged just cause agreement, they would be faced with the fact that the courts are in general agreement that a good faith management decision to lay off employees for economic reasons, if that layoff is not pretextual, discriminatory, or in violation of some applicable procedural requirement, constitutes just cause for an employee's termination, even under a contract requiring such cause. *See Taylor v. National Life Insurance Co.*, 161 Vt. 457, 652 A.2d 466 (1993); *Stull v. Combustion Engineering, Inc.*, 72 Ohio App.3d 553, 595 N.E.2d 504 (1991); *Ewers v. Stroh Brewery Co.*, 178 Mich.App. 371, 443 N.W.2d 504 (1989).

However, plaintiffs assert that, in addition to agreeing not to discharge them for other than just cause, PSC also agreed never to engage in an involuntary layoff. They argue, in essence, that PSC agreed never to reduce its labor costs by reducing the size of its workforce, even if it were facing substantial monetary losses.

There is, of course, no legal barrier to an employer agreeing to restrict its right to terminate employees in such a manner. However, because of the extraordinary limitation that would be created by such an agreement, some courts have insisted that any enforceable promise of this type be "clear and specific." *Taylor v. National Life Insurance Co.*, supra, 161 Vt. at 468, 652 A.2d at 473.

Moreover, quite irrespective of the nature of the promise, the common law generally requires that, to form the basis for an enforceable contract, a promise must be "reasonably certain"; that is, the promise must be sufficiently specific to "provide a basis for determining the existence of a breach and for giving an appropriate remedy." Restatement (Second) of Contracts § 33(1) & (2) (1981).

Further, the concept of promissory estoppel was developed by equity to enforce, in appropriate circumstances, a unilateral promise for which no consideration was provided. *See Vancheri v. GNLV Corp.*, 105 Nev. 417, 777 P.2d 366 (1989) (under theory of promissory estoppel reliance by promisee is substitute for consideration). Circumstances that warrant the application of the promissory estoppel doctrine result in the creation of a contract. Restatement (Second) of Contracts, supra, § 90 comment d.

Hence, whether an alleged promise is claimed to be a part of an express contract or is asserted as the basis for the application of promissory estoppel, it must, in either event, be sufficiently specific so that the judiciary can understand the obligation assumed and enforce the promise according to its terms.

This general precept has been applied by the Colorado courts in various settings. *See Stice v. Peterson,* 144 Colo. 219, 355 P.2d 948 (1960) (if language is too uncertain to allow court to determine intent, it cannot be enforced); *Mestas v. Martini,* 113 Colo. 108, 155 P.2d 161 (1944) (to be enforced, contract needs to be not only complete as to all essential terms but also of such certainty and definiteness as to be capable of enforcement); *Greater Service Homebuilders' Investment Ass'n v. Albright,* 88 Colo. 146, 293 P. 345 (1930) (if agreement is vague and indefinite as to any essential term, it does not constitute a contract).

In addition, several courts have considered this issue within the context of statements made by an employer to a prospective or present employee. In doing so, the courts have concluded that, to constitute an enforceable promise, such a statement must meet two requirements.

First, the statement must either disclose a promissory intent or be one that the employee could reasonably conclude constituted a commitment by the employer. If the statement is merely a description of the employer's present policies or a forecast of the employee's likely career progression, it is neither a promise nor a statement that could reasonably be relied upon as a commitment. *See Snyder v. Ag Trucking, Inc.,* 57 F.3d 484, 489 (6th Cir.1995) (statement that employer was a "fair company" and that employee would have job until he retired if he performed well are not promises; they are "general comments about career growth and company policy"); *Ruud v. Great Plains Supply, Inc.,* 526 N.W.2d 369 (Minn.1995) (statement that "good employees are taken care of" mere statement of policy, not a promise); *Vancheri v. GNLV Corp.,* supra, 105 Nev. at 422, 777 P.2d at 369 ("General expressions of long-term employment or job advancement do not convert an at-will employment contract to a termination only for cause contract").

This conclusion is entirely consistent with *Continental Air Lines, Inc. v. Keenan*, supra, 731 P.2d at 711-712, in which our supreme court determined that, to provide the basis for an actionable claim, a statement in an employee handbook must either manifest the employer's "willingness to enter into a bargain," or be one "that the employer should reasonably have expected the employee to consider . . . as a commitment from the employer. . . ." And, for this purpose at least, there is no analytical difference between a written statement in a handbook distributed to employees and an oral statement made by one in authority directly to an individual.

Second, even if the statement meets the foregoing requirement, it still must be sufficiently definite to allow a court to understand the nature of the obligation undertaken.

In applying this latter test, the courts have considered a variety of statements to be sufficiently definite and specific to be judicially enforceable. *See Stull v. Combustion Engineering, Inc.*, supra, (employee manual provided that, in case of lay-offs, consideration would be given to long-time employees, and employee with 34-year work history was told he would be around until plant closed); *Foley v. Interactive Data Corp.*, 47 Cal.3d 654, 254 Cal.Rptr. 211, 765 P.2d 373 (1988) (statement to employee that, if he did good job, his future was secure, combined with employer practice of not terminating without good cause, gave rise to good cause contract).

Likewise, divisions of this court, without referring to the specificity test, have enforced definite oral promises made to employees. *See Chidester v. Eastern Gas & Fuel Associates,* 859 P.2d 222 (Colo.App.1993) (promise, made to induce employees to transfer to division, that they would have five years and a minimum specific budget to recuperate division enforceable); *Tuttle v. ANR Freight System, Inc.,* 797 P.2d 825 (Colo.App.1990) (employee handbook's statement of no gender discrimination and specific method of determining wage rate support female employee's wage claim).

In contrast, less specific statements have been declared to be unenforceable. *See Vasey v. Martin Marietta Corp.,* 29 F.3d 1460, 1465 (10th Cir.1994) (assurances of fair treatment mere "vague assurances" and unenforceable under Colorado law); *Hayes v. Eateries, Inc.,* 905 P.2d 778 (Okla.1995) (assurance that employee would have job so long as performance adequate too vague); *Redgate v. Fairfield University,* 862 F.Supp. 724 (D.Conn.1994) (statement that employee could have job as long as he wanted unenforceable); *Snoey v. Advanced Forming Technology, Inc.,* 844 F.Supp. 1394 (D.Colo.1994) (under Colorado law, statement that employee hired for long-term goals not enforceable). *See also Allen v. Dayco Products, Inc.,* 758 F.Supp. 630 (D.Colo.1990) (applying Colorado law).

If the evidence is conflicting or will admit of more than one inference and one view of the evidence would support the existence of a contract, the issue is one for the jury. *I.M.A., Inc. v. Rocky Mountain Airways, Inc.,* 713 P.2d 882 (Colo.1986). If, on the other hand, the evidence discloses only a "vague assurance," rather than a legally enforceable promise, then the court must determine the issue as a matter of law. *Vasey v. Martin Marietta Corp.*, supra.

Here, whatever relevance they may have upon the claims for breach of the covenant of good faith, the various written statements contained in PSC's Corporate Code of Business Conduct, enjoining all employees to observe high ethical and moral standards when dealing with other employees, were so indefinitely generic as to be unenforceable under any contract or promissory estoppel theory.

Further, while it is undisputed that, with several rather insignificant exceptions, PSC had not engaged in an involuntary employee lay-off prior to the events giving rise to this controversy, plaintiffs introduced no evidence that PSC had formally adopted such a "no lay-off" policy. And, there is no evidence that PSC had adopted any uniform procedure (such as the distribution of some written announcement) to inform its employees of any such claimed policy.

In addition, because any such policy would have been unilaterally adopted, it could have been amended by PSC without liability, provided notice of such amendment was provided to the employees. *See Ferrera v. Nielsen*, 799 P.2d 458 (Colo.App.1990). And, it is undisputed that, several months before plaintiffs were laid off, they were provided written notice of the establishment of the task force and of the real possibility of a force reduction.

These considerations lead to the conclusion that plaintiffs' contract and promissory estoppel claims must be grounded upon the statements made by various supervisors, rather than upon PSC's pronouncement of some general policy. If these statements meet the requirements necessary to constitute a specific promise, plaintiffs may well be entitled to recover. If they do not, there is no other basis in the evidence for those claims.

The statements made to each of the plaintiffs vary somewhat, and they were made under varying circumstances. The issue we must address in each case, however, is whether the statement disclosed an intent to enter into a bargain, or was of a nature that the employee could conclude that a commitment was being made, on the one hand, or whether it was merely a vague assurance of job security, described PSC's past practice, or forecast the individual's job progression, on the other.

We consider the statements to the two successful plaintiffs first.

Plaintiff Carbone testified that, when interviewed for a position with PSC, he was told that, so long as he did his job, he would have a job with PSC. Later, one supervisor told him that there was no reason that he could not plan on retiring from PSC, and another said that he could work at PSC as long as he wanted to.

Not only does none of these statements refer to any specific promise or commitment that Carbone would never be laid off for economic reasons, but general assurances of a secure job, such as were made to this plaintiff, do not even result in a contract requiring just cause for termination. *Vasey v. Martin Marietta Corp.*, supra; *Hayes v. Eateries, Inc.*, supra; *Allen v. Dayco Products, Inc.*, supra.

The statements made to plaintiff Richey were of a similar character. She testified that, during her job interview, she was told that PSC "had never had any layoffs." Later, during an informal coffee-room conversation, PSC's director of human resources said, "The only way you leave [PSC] is either to retire or be carried out on a stretcher."

The statement referring to lay-offs was a recitation of a historical fact, not a promise that no lay-off would ever occur in the future. And, the later statements were, again, insufficient to create a restriction upon PSC's right to terminate. *Vasey v. Martin Marietta Corp.*, supra.

We have also examined each of the other plaintiff's description of the statements made; while each varied somewhat in context, they were of the same general character. Representative statements were "if you get hired here, you will probably be here for a long time"; PSC "always takes care of its employees"; "as long as you want to work, you will have a job"; "unlike Martin Marietta, [PSC] did not have layoffs"; PSC "is an extremely stable company to work for"; employee attrition is low because PSC offers lower wages and keeps employees until they retire or until they want to leave; and PSC "hadn't had a layoff in the past and it didn't look like it was going to in the future because of the work."

As we have noted, plaintiffs do not claim that their alleged contracts allowed PSC to terminate them only for just cause. They claim, rather, that they had been specifically assured that they would never be subjected to an involuntary lay-off. We conclude, however, that the supervisors' statements upon which they relied to establish their claims were neither promissory in nature nor sufficiently definite to be capable of judicial enforcement. They were either descriptions of past history, forecasts of the employee's future progression, or vague assurances of employment stability. As a matter of law, they were insufficient upon which to base either an express contract or promissory estoppel claim.

Nor did the evidence establish a proper basis for a claim based upon the breach of an express covenant of good faith.

We will assume that an employment-at-will contract contains no implied covenant of good faith, *see Farmer v. Central Bancorporation, Inc.*, 761 P.2d 220 (Colo.App.1988), but that use by an employer of general language similar to that contained in PSC's Corporate Code of Business Conduct gives rise to an express obligation upon the subject, *see Decker v. Browning-Ferris Industries*, 931 P.2d 436 (Colo.1997). Nevertheless, in either case, the obligation is only to assure that the parties will exercise good faith in performing the obligations and exercising the rights created by the other provisions of the agreement.

The covenant of good faith and fair dealing, whether express or implied, does not inject new substantive terms into a contract or change its existing terms. *Amoco Oil Co. v. Ervin*, 908 P.2d 493 (Colo.1995); *Wells Fargo Realty Advisors Funding, Inc. v. Uioli, Inc.*, 872 P.2d 1359 (Colo.App.1994). Such a covenant, therefore, cannot limit an employer's right to discharge without cause, unless there is an express or implied promise, independent of the covenant of good faith itself, restricting that right.

Here, because we have concluded, as a matter of law, that no limiting promise was made, no claim based upon the breach of the alleged express covenant was established.

Finally, because we have concluded that the various statements were insufficient to create any contractual obligation on PSC's part, we need not address any issue with respect to the doctrine of "special consideration." *See Schur v. Storage Technology Corp.*, 878 P.2d 51 (Colo.App.1994); *Pittman v. Larson Distributing Co.*, 724 P.2d 1379 (Colo.App.1986).

The judgment in favor of plaintiffs Carbone and Richey is reversed. In all other respects, the judgment of the district court is affirmed.

ERICKSON* and PIERCE*, JJ., concur.

---

* Sitting by assignment of the Chief Justice under provisions of the Colo. Const. art. VI, Sec. 5(3), and § 24-51-1105, C.R.S. (1996 Cum.Supp.).

2

Supreme Court, U.S.
FILED
NOV 24 1998
CLERK

No. 98-815

In The

# Supreme Court of the United States

October Term, 1998

◆

BROWNING-FERRIS INDUSTRIES of COLORADO, INC.,

*Petitioner,*

v.

THOMAS H. DECKER,

*Respondent.*

◆

**On Petition For A Writ Of Certiorari**
**To The Colorado Supreme Court**

◆

## SUPPLEMENTAL BRIEF RE: NEW CASE IN SUPPORT OF PETITION FOR CERTIORARI

◆

McNamara Law Firm, P.C.

John N. McNamara, Jr.
Colorado Registration No. 2471
*Counsel of Record*

Ricardo M. Barrera
Colorado Registration No. 20365
*Special Counsel*

1660 17th Street, Suite 100
Denver, Colorado 80202
Tel: 303.572.1660

*Counsel for Petitioner*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

24pp

## CONFIRMING REASONS FOR GRANTING THE WRIT

Pursuant to U.S. S.Ct. Rule 15.8, petitioner, Browning-Ferris Industries of Colorado, Inc. ("BFI"), calls the Court's attention to a new case decided by the Colorado Court of Appeals, *Hoyt v. Target Stores, Division of Dayton Hudson Corp.*, ___ P.2d ___, Slip Opinion, No. 95CV2066 (Colo. App. November 13, 1998), reprinted herein as Appendix A.

BFI's Petition for Writ of Certiorari in this Court is dated November 11, 1998. The Colorado Court of Appeals issued its opinion in *Hoyt* on November 13, 1998. The *Hoyt* opinion authoritatively confirms that BFI was denied due process and equal protection of law and why certiorari review by the Court is warranted.

◆

## DENIAL OF DUE PROCESS

In *Hoyt*, the Colorado Court of Appeals reversed the state trial court's denial of a motion for directed verdict by the defendant employer on plaintiff-employee's claim for breach of covenant of good faith and fair dealing. The *Hoyt* court wrote:

> In *Decker v. Browning-Ferris Industries of Colorado, Inc.*, 931 P.2d 436 (Colo. 1997) (*Decker I*) and *Decker v. Browning-Ferris Industries of Colorado, Inc.*, 947 P.2d 937 (Colo. 1997) (*Decker II*), the Colorado Supreme Court affirmed judgments in favor of two employees for substantial sums, based on jury verdicts finding that their employer had violated an express covenant of

> good faith and fair dealing. In doing so, however, the supreme court did not determine whether such a claim was recognized in Colorado nor whether the factual circumstances relied on by plaintiffs in those two cases supported the finding of a violation of the covenant. Rather, the court noted that the issue whether there is an express covenant of good faith claim in the employment context had not been presented to it. *See* Criswell, *Recent Employment Law Developments in Colorado,* 27 Colo. Law. 5 (May 1998).[1]

Appendix A-12. The foregoing is express judicial recognition that BFI has suffered liability for "substantial sums" on a non-existent claim and thus when no Colorado court has ever adjudicated the facts in the context of such a non-existent claim. Again, BFI asks how judgments of substantial sums for violation of covenant of good faith and fair dealing could be affirmed by the Colorado Supreme Court when it, as now expressly confirmed by the Colorado Court of Appeals, acknowledged that "the issue whether there is an express covenant of good faith claim in the employment context had not been presented to it." The Colorado Supreme Court has deprived BFI of its property without due process of law.

◆

---

[1] The case referred to as *Decker I* by the *Hoyt* court is referred to as *Thomas Decker II* by BFI in its Petition for a Writ of Certiorari and is appended thereto as Appendix H. The case referred to as *Decker II* by the *Hoyt* court is referred to as *Russell Decker* by BFI in its Petition for a Writ of Certiorari and is appended thereto as Appendix K. The article cited by the *Hoyt* court is by the Honorable John A. Criswell, a sitting judge of the Colorado Court of Appeals.

## DENIAL OF EQUAL PROTECTION OF LAW

In its petition for certiorari, BFI demonstrated that it has been irrationally selected to suffer judgments "for substantial sums" on an unrecognized claim for breach of covenant of good faith and fair dealing when other similarly situated employers in Colorado are shielded from such judgments by the Colorado courts. BFI cited to *Soderlun v. Public Service Co.*, 944 P.2d 616 (Colo. App. 1997),[2] as an example of a similarly situated employer who was protected by the Colorado common law of contracts.

In *Hoyt*, the court protected yet another similarly situated employer from liability based on Colorado's common law of contracts, citing *Soderlun*:

> Whether an alleged promise is claimed to be part of an express contract or is asserted as the basis for the application of promissory estoppel, it must be sufficiently specific so that the judiciary can understand the obligation assumed and enforce the promise according to its terms. *Soderlun v. Public Service Co.*, 944 P.2d 616 (Colo. App. 1997).

Appendix A-13. For substantially the same or similar promises of fair treatment made by the employer-defendant in *Soderlun* and the employer-defendant in *Hoyt* as made by BFI in the *Decker* cases, the Colorado Court of Appeals has held that no liability in contract shall attach, despite the fact that the Colorado Supreme Court "affirmed judgments in favor of two employees for substantial sums, based on jury verdicts finding that their employer had violated an express covenant of good faith and fair dealing." *Hoyt*, Appendix A-12. The Colorado appellate courts have thus deprived BFI of the equal protection of the law.

---

[2] Appendix M, BFI's Petition for a Writ of Certiorari.

◆

## CONCLUSION

This new case by the Colorado Court of Appeals confirms that the reasons for granting a writ of certiorari in this case, as presented by BFI, are based on good authority.

Respectfully submitted,

JOHN N. MCNAMARA, JR.
(*Counsel of Record*)

RICARDO M. BARRERA
(*Special Counsel*)

MCNAMARA LAW FIRM, P.C.
Suite 100
1660 17th Street
Denver, Colorado 80202
Tel: 303.572.1660

*Counsel for Petitioner*

November 23, 1998

## APPENDIX A

---

COLORADO COURT OF APPEALS

November 13, 1998

No. 97CA0367

---

Susan Hoyt,

Plaintiff-Appellee,

v.

Target Stores, Division of Dayton Hudson Corporation,

Defendant-Appellant

---

Appeal from the District Court of Jefferson County

Honorable William P. DeMoulin, Judge

No. 95CV2066

Division V JUDGMENT AFFIRMED IN PART

Opinion by JUDGE ROTHENBERG AND REVERSED IN PART

Tursi*, J., concurs

Taubman, J., concurs in part,

dissents in part

---

Michael O'Malley, Denver, Colorado; Ronald A. Podboy, Denver, Colorado, for Plaintiff-Appellee
Faegre & Benson, LLP, Elizabeth A. MacDonald, Daniel Grossman, for Defendant-Appellant

---

* Sitting by assignment of the Chief Justice under provisions of the Colo. Const. art. VI, Sec. 5(3), and § 24-51-1105, C.R.S. 1998.

In this action arising out of an employment dispute, defendant, Target Stores, Inc., (Target) appeals the judgment entered on a jury verdict finding it liable to plaintiff, Susan Hoyt, its former employee. We affirm in part and reverse in part.

After plaintiff was terminated by Target in June 1995, she filed this action alleging a number of claims, two of which went to trial. The jury returned a verdict in plaintiff's favor on both claims, awarding her $200,000 in compensatory damages and $35,000 in punitive damages for wrongful discharge in violation of public policy, and $15,000 in compensatory damages for breach of express covenant of good faith and fair dealing.

The evidence surrounding plaintiff's termination was highly disputed. Basically, Target contended that plaintiff had altered two timecards in order to be paid for one and one-half hours of travel time to which she was not entitled. According to Target, this alleged "falsification" of company documents constituted gross misconduct and justified her immediate dismissal.

Plaintiff maintained that Target's stated reason for termination was pretextual and that her termination was motivated by a dispute between her and a new supervisor over plaintiff's entitlement to travel time pay. She relied on the Colorado Wage Claim Act, §8-4-101, et seq., C.R.S. 1998, which makes it unlawful for the agent of an employer to willfully refuse to pay a wage claim, or falsely deny the amount of a wage claim, or the validity thereof, "with intent to annoy, harass, oppress, hinder, delay, or defraud the person to whom such indebtedness is due. . . . " Section 8-4-117, C.R.S. 1998.

Plaintiff presented evidence at trial that she had worked for Target for thirteen years in a clerical capacity, that her duties had included payroll, that she was rated as an "outstanding" or "excellent" employee on all of her performance reviews until September 1994, when a new supervisor was hired, and that the new supervisor then began to downgrade her.

As to the specific incident that led to her termination, plaintiff's evidence indicated that: (1) by Target policy, she was entitled to be paid for one and one-half hours of time spent on May 4, 1995, and May 8, 1995, traveling to a Target store other than her regularly assigned store; (2) the supervisor had refused to pay plaintiff for that travel time; (3) plaintiff had not falsified the two timecards in question, but had corrected them to reflect accurately the hours to which she was entitled to be paid; (4) in making these changes, plaintiff had included some travel time on the May 4 timecard and some on the May 8 timecard, thus avoiding overtime for the week of May 4; and (5) because overtime was strongly disfavored by Target management, this procedure of "pushing time forward" was a cost-saving method routinely used by Target's employees and management alike to avoid overtime.

Also, plaintiff's evidence indicated that Target's policy regarding travel time was not administered in an even-handed manner by the supervisor; that other employees had followed a similar procedure to that used by plaintiff and had received compensation for similar travel time; the other employees had not been subjected to disciplinary actions; and the changes made by plaintiff in her timecards had saved Target money.

## I.

Initially, we reject Target's contention that the trial court erred in denying its pretrial motion for summary judgment as to plaintiff's two successful claims for relief. The denial of a motion for summary judgment is not reviewable. *Feiger, Collison & Killmer v. Jones,* 926 P.2d 1244 (Colo. 1996).

## II.

Target contends that, because plaintiff's claim was not based on a sufficiently specific enunciation of public policy, the trial court erred in failing to direct a verdict in its favor on plaintiff's claim for wrongful discharge in violation of public policy. We disagree.

An at-will employee establishes a prima facie case of wrongful discharge if the employee shows that: (1) the employer directed the employee to perform an illegal act as part of the employee's work-related duties or prohibited the employee from performing a public duty or exercising an important job-related right of privilege; (2) the action directed by the employer would violate a specific statute relating to the public health, safety, or welfare, or would undermine a clearly expressed public policy relating to the employee's basic responsibility as a citizen or the employee's right or privilege as a worker; (3) the employee was terminated as a result of refusing to perform the act directed by the employer or for exercising the privilege to which the employee was entitled; and (4) the employer was aware or reasonably should have been aware that the employee's refusal to comply with the order or directive was based on the employee's reasonable belief that the action ordered was illegal, contrary to clearly expressed statutory policy relating to the employee's duty as a citizen, or violative of the employee's legal right or privilege as a worker. *See Martin Marietta Corp. v. Lorenz,* 823 P.2d 100 (Colo. 1992); *Lathrop v. Entenmann's, Inc.,* 770 P.2d 1367 (Colo. App. 1989).

In *Crawford Rehabilitation Services, Inc. v. Weissman,* 938 P.2d 540 (Colo. 1997), plaintiff alleged that she was terminated for calling the Colorado Division of Labor and complaining that her employer was attempting to eliminate her rest breaks. The supreme court rejected her claim that she had a public policy right to report such violations pursuant to §8-6-115, C.R.S. 1998. It noted that plaintiff's call to the division did not result in the initiation of an investigation or proceeding by the director, and concluded that plaintiff's wrongful discharge claim was *not* based upon clearly expressed public policy relating to an employee's basis rights or duties.

In so ruling, the court acknowledged that the public policy supporting such a claim was not "subject to precise definition," *Crawford Rehabilitation Services, Inc. v. Weissman, supra,* 938 P.2d at 552, but it described several situations in which actions do contravene public policy. These include: claims involving a matter affecting society as a whole, rather than the personal or proprietary interests of the parties; actions which strike at the heart of a citizen's social rights, duties, and responsibilities; and actions by an employer which lead to an outrageous result clearly inconsistent with a stated public policy. *See* Sabey & Moore, *Crawford's Balancing Test: At-Will Employment*

*Versus Public Policy Wrongful Discharge,* 27 Colo. Law 89 (November 1998).

The court emphasized that in order to justify interference into an employer's business decisions, discharge claims based upon public policy must concern behavior that truly impacts the public. *Compare Rocky Mountain Hospital v. Mariani,* 916 P.2d 519 (Colo. 1996) (accountant discharged for refusing to use misleading accounting principles stated cognizable claim for wrongful discharge) *with Dyson v. District of Columbia Department of Employment Services,* 566 A.2d 1065 (D.C. App. 1989) (discharge of worker for leaving assembly line to take medication in violation of employer's instructions did not constitute retaliatory discharge under workers' compensation statute).

The *Crawford* court rejected the employee's claim because it did not view the claim "that she was terminated for exercising a right either to call the division or to take rest breaks as one that truly impacts the public." *Crawford Rehabilitation Services, Inc. v. Weissman, supra,* 938 P.2d at 558.

Here in contrast, the issue involved was the right of employees to be duly compensated by an employer under the Colorado Wage Claim Act, §8-4-101, et seq., C.R.S. 1998, for time actually worked, which has been acknowledged to be an issue of major public and economic importance in Colorado. *See Morris v. Towers Financial Corp.,* 916 P.2d 678 (Colo. App. 1996); *Porter v. Castle Rock Ford Lincoln Mercury,* 895 P.2d 1146 (Colo. App. 1995).

Plaintiff presented evidence that her supervisor had directed her and other Target employees not to exercise their job-related rights to be paid for travel time from store to store, in violation of the Colorado Wage Claim Act, and that the real reason for her discharge was because she had exercised that right. Because such a right impacts the public at large, it is a considerably more significant claim of entitlement than the rest breaks involved in *Crawford*.

Target nevertheless asserts that plaintiff's termination was unquestionably justified by her falsification of the company's timecards and by her unauthorized exercise of "self-help." However, that assertion overlooks the fact that the jury in its verdict form specifically found that Target's action in firing plaintiff was *not* justified.

The jury also found in its verdict form that receiving payment for travel time was an important work-related right or privilege; that Target's instruction that plaintiff would not be paid for travel time prevented plaintiff from exercising an important work-related right or privilege; that Target had fired plaintiff because she refused to comply with the supervisor's instruction; and that Target's termination of plaintiff "was attended by circumstances of fraud or malice or willful and wanton conduct," which justified an award of punitive damages.

These factual determinations by the jury are irreconcilable with Target's version of events.

As to Target's assertion that the employees as a whole, and plaintiff in particular, should have filed formal complaints about its travel pay policy with governmental agency, plaintiff presented evidence that Target systematically discouraged its employees from exercising their statutory rights under the Colorado Wage Claim Act to be paid for all wages due, including payment for "all amounts for labor or service performed." Section 8-4-101(9), C.R.S. 1998 (defining "wages). The evidence showed that Target's unwritten policy of discouraging such payments and its *sub silentio* policy of "looking the other way" made such formal complaints unnecessary and inadvisable. *Cf. Dyson v. District of Columbia Department of Employment Services, supra,* 566 A.2d at 1067 ("the formal filing of a claim may not be the only way an employee may acquire the protection of the retaliatory discharge provision [of the workers' compensation statute]"). *See* Sabey & Moore, *Crawford's Balancing Test: At-Will Employment Versus Public Policy Wrongful Discharge, supra,* 27 Colo. Law. at 91 (employee faced with an improper order ordinarily is required to "obey now, grieve, later," but if the obedience to the order would require the employee to forego a substantial, fundamental right, employee is entitled to disregard it.)

Thus, according to plaintiff's evidence, what Target characterizes as "self-help" was done as an accepted policy of the company and benefitted Target by allowing it to avoid paying overtime to its employees. Under such circumstances, a formal complaint to Target about its travel reimbursement policy would have been a futile gesture.

Further, while the plaintiff in *Crawford Rehabilitation Services, Inc. v. Weissman, supra,* did in fact file a complaint against her employer before bringing her action, we are unaware of any decision by the supreme court or any panel of this court holding that the formal filing of such a complaint by an employee is a prerequisite for a claim of wrongful discharge in violation of public policy. Target has also failed to cite authority for the proposition that the filing of a formal complaint against an employer is a condition precedent to an employee's claim of wrongful discharge in violation of public policy.

In summary, the Colorado Wage Claim Act clearly establishes as public policy that employees are entitled to be paid for the time they work. Because there was evidence, albeit disputed, that plaintiff was fired for asserting her rights under that Act, and because the supreme court has stated that such a claim is not "subject to precise definition." *Crawford Rehabilitation Services, Inc. v. Weissman, supra,* 938 P.2d at 552, we conclude that its resolution here was properly left to the jury.). *See* Sabey & Moore, *Crawford's Balancing Test: At-Will Employment Versus Public Policy Wrongful Discharge, supra,* 27 Colo. Law. at 91 (whether a given right "truly impacts the public" appears to be practical and fact-sensitive).

Accordingly, the trial court did not err in denying Target's motion for a directed verdict on her claim of wrongful discharge in violation of public policy.

## III.

Relying on *Gamble v. Levitz Furniture Co.,* 759 P.2d 761 (Colo. App. 1988), Target next contends that plaintiff's common law claim for wrongful discharge in violation of public policy cannot prevail as a matter of law because the Colorado Wage Claim Act provides its own wrongful discharge claim for retaliation. We disagree.

In *Gamble,* plaintiff maintained he was wrongfully discharged because of his disability in violation of §24-34-402 (1)(f)(I), C.R.S. 1998. A division of this court rejected his claim because the statute contained its own wrongful discharge remedy. The division concluded that the statutory remedy barred plaintiff's common law claim. But, *Gamble* has been distinguished in later cases involving violations of statutory claims.

In *Lathrop v. Entenmann's, Inc., supra,* plaintiff alleged that his discharge was in retaliation against him for exercising his right to receive workers' compensation benefits. There, as here, the employer asserted that the workers' compensation statute provided the employee with an exclusive remedy, and the employer's argument was rejected by the panel.

The *Lathrop* court acknowledged *Gamble,* but distinguished it because it concerned the violation of an employer's own alleged statutory violation, and because it, along with other earlier cases, such as *Cronk v. Intermountain Rural Electric Ass'n,* 765 P.2d 619 (Colo. App. 1988), had "not involved an employee's exercise of a statutory right." *Lathrop v. Entenmann's, Inc., supra,* 770 P.2d at 1372. The division in *Lathrop* concluded that, because an employer has a publicly imposed duty to provide compensation to its employees for injuries and employees have a statutory right to receive such compensation, plaintiff there had properly stated a claim for wrongful discharge in violation of public policy based upon the employer's retaliation against him.

Here, plaintiff alleged and presented evidence that she had been discharged in retaliation by her supervisor at Target because plaintiff had pursued an important work-related right based on a Colorado statute. She also presented evidence that Target employees were discouraged from seeking compensation for certain hours which they had worked, and that overtime was looked upon with disfavor by Target.

We are not persuaded by Target's argument that *Lathrop* is distinguishable because plaintiff here was fully paid and had not actually filed a claim pursuant to the Act. Plaintiff did not file a formal claim for unpaid wages because there were none, and the jury by its verdict necessarily determined that Target had penalized her by wrongfully discharging her and by alleging she had been dishonest and had violated company policy. Similarly, in its verdict the jury specifically rejected Target's theory that plaintiff had been fired for gross misconduct and for falsifying company documents.

To deny plaintiff a common law claim for her failure to perform a futile act because she had been fully paid would allow her employer to have dismissed her for what she asserted and showed was a pretextual reason. Accordingly, we reject Target's assertion that plaintiff's remedies were limited by the Colorado Wage Claim Act.

## IV.

However, we do agree with Target's contention that the trial court erred in failing to direct a verdict in its favor on plaintiff's claim for breach of express covenant of good faith and fair dealing.

Before trial, the court granted Target's motion for summary judgment as to plaintiff's implied contract and promissory estoppel claims because a conspicuous disclaimer in Target's employee handbook precluded an enforceable unilateral offer. The disclaimer admonished employees to "keep in mind that this is a handbook, not a contract. It doesn't guarantee you employment for any particular length of time, or limit how employment may end."

However, the court permitted plaintiff to proceed on her claim for breach of express covenant of good faith and fair dealing. It also clarified that she had the burden of proving Target had created an enforceable promise independent of the company's manual.

In *Decker v. Browning-Ferris Industries of Colorado, Inc.*, 931 P.2d 436 (Colo. 1997) (Decker I) and *Decker v. Browning-Ferris Industries of Colorado, Inc.*, 947 P.2d 937 (Colo. 1997) (Decker II), the Colorado Supreme Court affirmed judgments in favor of two employees for substantial sums, based on jury verdicts finding that their employer had violated an express covenant of good faith and fair dealing. In doing so, however, the supreme court did not determine whether such a claim was recognized in Colorado nor whether the factual circumstances relied on by plaintiffs in those two cases supported the finding of a violation of the covenant. Rather, the court noted that the issue whether there is an express covenant of good faith claim in the employment context had not been presented to it. *See* Criswell, *Recent Employment Law Developments in Colorado,* 27 Colo. Law. 5 (May 1998).

Both Decker I and Decker II stand only for the proposition that, if a claim based on the violation of an express covenant of good faith is to be recognized, such a claim is a contractual one. It is not one sounding in tort. *See*

Criswell, *Recent Employment Law Developments In Colorado, supra.*

Whether an alleged promise is claimed to be part of an express contract or is asserted as the basis for the application of promissory estoppel, it must be sufficiently specific so that the judiciary can understand the obligation assumed and enforce the promise according to its terms. *Soderlun v. Public Service Co.*, 944 P.2d 616 (Colo. App. 1997).

Thus, in order to constitute an enforceable promise, a statement by the employer must meet two requirements. It must disclose a promissory intent or be one that the employee could reasonably conclude constituted a commitment by the employer. If it is merely a description of the employer's present policies, it is neither a promise nor a statement that can reasonably be relied upon. In addition, the employer's statement must be sufficiently definite to allow a court to understand the nature of the obligation undertaken. *Soderlun v. Public Service Co., supra.*

Assurances of fair treatment or "mere vague assurances" are unenforceable. *Vasey v. Martin Marietta Corp.*, 29 F.3d 1460, 1465 (10th Cir. 1994).

Here, after plaintiff presented her evidence at trial, Target moved for a directed verdict as to plaintiff's claim for breach of the express covenant of good faith and fair dealing. The court denied the motion, concluding that plaintiff had shown an independent contract apart from Target's policy and procedure manual.

The trial court based its ruling on the testimony of a former human resources manager who had been employed by Target until November 1994, and who testified that Target managers had employed "industrial due process" to "keep fair and consistent policy throughout the store." The witness stated that:

> If you are consistent and you make sure you treat everybody the same, fairness follows right behind it. And that's what we wanted to do in industrial due process was to make sure everybody was treated the same.

However, the witness' promise, made when she worked for Target, merely described Target's policies at that time. Because a vague assurance of fair and consistent treatment cannot form the basis of an express covenant of good faith and fair dealing, and the statement here constituted such a vague assurance, we conclude as a matter of law that there was no underlying contract. *See Vasey v. Martin Marietta Corp., supra; Poff v. Western National Mutual Insurance Co.,* 13 F.3d 1189, 1191 (8th Cir. 1994) (statement in employee manual that, "[w]e pride ourselves on treating our employees fairly and in a consistent manner," not sufficiently definite to permit jury to find an express covenant of good faith and fair dealing).

Therefore, the trial court erred in not granting Target's motion for directed verdict on her claim of breach of express covenant of good faith and fair dealing.

The portion of the judgment awarding plaintiff compensatory and punitive damages based on the wrongful discharge claim is affirmed. The portion of the judgment based on breach of express covenant of good faith and fair dealing is reversed.

JUDGE TURSI concurs.

JUDGE TAUBMAN concurs in part and dissents in part.

JUDGE TAUBMAN concurring in part and dissenting in part.

Because I believe the trial court missed the mark by failing to direct a verdict in favor of defendant, Target Stores, (Target), on the claim of plaintiff, Susan Hoyt, for wrongful discharge in violation of public policy, I disagree with Part II of the majority's opinion. Hence, I would reverse the judgment in its entirety.

My review of our appellate decisions leads me to conclude that a claim for wrongful discharge in violation of public policy may not be predicated upon the self-help actions of an employee, even if the employee's actions are intended to vindicate her rights under the Colorado Wage Claim Act, §8-4-101, et seq., C.R.S. 1998.

The majority holds that Hoyt established a claim for wrongful discharge in violation of public policy by showing that Target prohibited her from performing a public duty or exercising an important job-related right of privilege – enforcing her rights under the Wage Claim Act. In my view, however, Hoyt failed to establish a prima facie case of wrongful discharge in violation of public policy on this or any other basis enunciated by our courts for such a claim.

In *Crawford Rehabilitation Services, Inc. v. Weissmân*, 938 P.2d 540, 552 (Colo. 1997), the supreme court stated:

> The public policy exception is grounded in the notion that an employer should be prohibited from discharging an employee with impunity for reasons that contravene widely accepted and substantial public policies. Although public policy wrongful discharge is not subject to precise definition, it has been variously described as an action that involves a matter that affects society at large rather than a purely personal or proprietary interest of the plaintiff or employer, . . . leads to an outrageous result clearly inconsistent with the stated public policy . . . or strikes at the heart of a citizen's social rights, duties and responsibilities.

The *Crawford* court characterized prior decisions as recognizing claims for wrongful discharge in violation of public policy in two categories: (1) terminating an employee for refusing to engage in unlawful or unethical conduct and (2) terminating an employee for exercising a job-related right.

Here, I agree with the majority that vindicating claims under the Colorado Wage Claim Act involves a matter that affects society at large rather than a purely personal or proprietary interest. *See Morris v. Towers Financial Corp.,* 916 P.2d 678 (Colo. App. 1996) (Wage Claim Act provides clear, comprehensive statutory scheme designed to require employers to pay wages earned by their employees in a timely manner); *Porter v. Castle Rock Ford Lincoln Mercury, Inc.,* 895 P.2d 1146 (Colo. App. 1995) (plaintiff who prevails on Wage Claim Act claim is entitled to recover attorney fees to vindicate purpose of Act, even if defendant employer prevails on negligence counterclaim). *Cf. Crawford Rehabilitation Services, Inc. v. Weissman, supra* (interest in assuring rest breaks as provided under Colorado Wage Claim Act is largely personal, rather than a matter that affects society at large).

However, I dissent because I believe a claim for wrongful discharge in violation of public policy must be based upon an employee's complaint to a governmental agency or a complaint to the employee's supervisor concerning the employer's challenged conduct. Here, Hoyt did neither.

Even viewing the evidence in the light most favorable to Hoyt, I do not believe the circumstances here satisfy the requirement for an employee exercising a job-related right.

In *Crawford Rehabilitation Services, supra,* the supreme court cited *Lathrop v. Entenmann's, Inc.,* 770 P.2d 1367 (Colo. App. 1989) for the proposition that a wrongful discharge public policy claim may be based upon an employee's termination for exercising a job-related right. In *Lathrop,* a division of this court held that an employee stated a claim for wrongful discharge in violation of public policy when he alleged that he was discharged in retaliation for firing a workers' compensation claim.

Here, in contrast, Hoyt did not file any claim with the Division of Labor or any other governmental agency. She did even less than the plaintiff in *Crawford Rehabilitation Services, supra,* who did complain to the Division of Labor about lack of rest breaks, but whose complaint did not result in the initiation of an investigation or proceeding by the director of the Division of Labor.

Rather, here, Hoyt altered timecards without supervisor approval. She was not discharged in retaliation for complaining to any governmental agency about the procedures which Target required her to follow for completing timecards for travel between stores.

We ought not to establish a claim for wrongful discharge in violation of public policy which rewards an employee for engaging in self-help. *See Dyson v. District of Columbia Department of Employment Services,* 566 A.2d 1065 (D.C. App. 1989) (worker's unauthorized act of self-help in stopping work in order to take medication was not a claim for compensation under District's workers' compensation act); *cf. People v. Pittam,* 194 Colo. 104, 572 P.2d 135 (1977) (in attorney disciplinary proceeding, respondent's taking money as self-help measure because he felt he had been unfairly dealt with by his partners did not excuse his professional misconduct but was properly considered as a mitigating circumstance).

Further, the majority's reliance on *Dyson* is misplaced. The *Dyson* court did state that the formal filing of a claim with governmental agency may not be the only way an employee may acquire the protection of a retaliatory discharge provision under the District of Columbia's workers' compensation statute. However, the court then cited as a supporting example another case in which an employee had instituted a claim under the Texas workers' compensation statute by reporting his injury to the employer. Here, of course, Hoyt neither filed a claim with a governmental agency nor complained to her employer about Target's travel reimbursement policy.

By recognizing a claim for wrongful discharge in violation of public policy in these circumstances, the majority pursues a course of action that will operate to reward employees who choose to take employment disputes into their own hands, rather than pursue established avenues of relief, such as complaints to relevant governmental agencies or company supervisors.

As noted above, Hoyt's circumstances do not fit within any of the other circumstances in which our appellate courts have recognized a claim for wrongful discharge in violation of public policy. She was not terminated for refusing to perform an act directed by her employer. *See Rocky Mountain Hospital & Medical Service v. Mariani,* 916 P.2d 519 (Colo. 1996). Nor was she directed to perform an illegal act as part of her work-related duties.

Further, Hoyt's actions are distinguishable from the circumstances in *Martin Marietta Corp. v. Lorenz,* 823 P.2d 100 (Colo. 1992), where a wrongful discharge in violation of public policy claim was found to exist under circumstances in which the plaintiff had refused to engage in acts of deception and misrepresentation concerning the quality of materials used by his employer in designing equipment for the National Aeronautics and Space Administration. Unlike in *Lorenz,* Hoyt did not express her concerns to her superiors, but simply exercised self-help and altered time records based upon her belief as to the correctness of her interpretation of the Colorado Wage Claim Act.

I would further hold that, even if Hoyt had a reasonable belief that Target was violating the provisions of the

Wage Claim Act, she was required to express her concerns to her superiors or file a complaint with a governmental agency, and that she may not predicate a claim of wrongful discharge in violation of public policy on actions which may fairly be characterized as self-help.

I conclude with the cautionary statement of the supreme court in *Crawford Rehabilitation Services, Inc. v. Weissman, supra,* 938 P.2d at 553:

> Not all potential sources of public policy are of sufficient gravity to outweigh the precepts of at-will employment. We must develop the common law in this area with care.

Accordingly, I dissent as to Part II of the majority's opinion, and, for that reason, would not reach the issue addressed in Part III. Otherwise, I concur with Parts I and IV of the majority opinion. Hence, I would reverse the judgment in its entirety.

③

Supreme Court, U.S.
FILED
DEC 21 1998
OFFICE OF THE CLERK

No. 98-815

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1998

BROWNING-FERRIS INDUSTRIES
OF COLORADO, INC.,

*Petitioner,*

vs.

THOMAS H. DECKER,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE COLORADO SUPREME COURT

# RESPONDENT'S BRIEF IN OPPOSITION

STEFAN KAZMIERSKI
Colorado Reg. No. 18234
*Counsel of Record*
ROSEMAN & KAZMIERSKI, LLC
*Attorneys for Respondent*
899 Logan Street
Suite 203
Denver, CO 80203
(303) 839-1771

150312
Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

13 pp

## TABLE OF CONTENTS

| | *Page* |
|---|---|
| Table of Cited Authorities | ii |
| Statement of Jurisdiction | 1 |
| Statement of the Case | 4 |
| Reasons for Denying the Writ | 6 |
| Conclusion | 9 |

## TABLE OF CITED AUTHORITIES

*Page*

**Cases:**

*Adams v. Robertson*, 520 U.S. 83 (1997) ........... 6

*Continental Air Lines, Inc. v. Keenan*, 731 P.2d 708 (Colo. 1987) ........... 8

*Grover v. Industrial Comm'n*, 759 P.2d 705 (Colo. 1988) ........... 3

*Jankovich v. Indiana Toll Road Comm.*, 379 U.S. 487 (1891) ........... 8

*Missouri v. Jenkins*, 496 U.S. 33 (1990) ........... 1

*Moore v. Moore*, 215 Ga. 47, 108 S.E. 2d 704 (1959) . 3

*Mortgage Finance, Inc. v. Podleski*, 742 P.2d 900 (Colo. 1987) ........... 8

*Ricci v. Davis*, 627 P.2d 1111 (Colo. 1981) ........... 8

*Trimble v. City and County of Denver*, 697 P.2d 716 (Colo. 1985) ........... 5

**United States Constitution:**

Fourteenth Amendment ........... 4

*Cited Authorities*

*Page*

**Rules:**

Colorado Appellate Rule 54(b) .................... 2, 3

Supreme Court Rule 13.1 ........................ 1, 4

## STATEMENT OF JURISDICTION

This Court lacks jurisdiction to review the judgment below for three reasons. First, the petition for writ of certiorari is untimely since the Colorado Supreme Court denied certiorari more than 90 days before Browning Ferris Industries of Colorado, Inc. ("BFI") filed its petition in this Court. Second, the Colorado Supreme Court was without jurisdiction to consider BFI's Combined Petition for Rehearing and Motion for Relief for Denial of Federal and State Constitutional Rights, because there is no procedure for a petition for rehearing from a denial of certiorari review in Colorado. Third, the Colorado Supreme Court ordered that the petition for rehearing be stricken, not denied.

The Colorado Supreme Court denied BFI's petition for writ of certiorari on July 27, 1998. Supreme Court Rule 13.1 requires that a petition for a writ of certiorari be filed "within 90 days after entry of the order denying discretionary review." BFI filed its petition for a writ of certiorari in this Court on November 16, 1998, three weeks after its deadline had passed. The 90-day limit is mandatory and jurisdictional, and this Court has no authority to extend the period for filing except as Congress permits. *Missouri v. Jenkins*, 496 U.S. 33, 45 (1990). The writ was filed out of time and must be dismissed.

Supreme Court Rule 13.3 is not applicable to this case. That rule states that:

> [i]f a petition for rehearing is timely filed in the lower court by any party, the time to file a petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of the petition for rehearing.

The Colorado Appellate Rules allow a petition for rehearing only under limited circumstances and do not allow for a petition for rehearing after a denial of a writ of certiorari. The time for filing a petition for a writ of certiorari in this Court must run from the date of denial of certiorari review in the Colorado Supreme Court.

Colorado Appellate Rule 54(b) currently provides:

> **Denial of Writ.** No mandate shall issue upon the denial of a petition for writ of certiorari. Whenever application for a writ of certiorari to review a decision of any court is denied, the clerk shall enter an order to that effect, and shall forthwith notify the court below and counsel of record. If, after granting the writ, the court later denies the same as having been improvidently granted or renders decision by opinion of the court on the merits of the writ, petition for rehearing may be filed in accordance with the provisions of C.A.R. 40.

Under C.A.R. 54(b), a petition for rehearing may only be filed after the Colorado Supreme Court grants a writ and later determines it had been improvidently granted, or after an opinion on the merits of the writ. A petition for rehearing cannot be filed after the denial of a writ of certiorari.

The fact that a petition for rehearing is not permitted after a denial of a writ of certiorari in Colorado is also made evident by the amendments to C.A.R. 54(b). C.A.R. 54(b), effective March 30, 1970, read:

> **Denial of Writ.** No mandate shall issue upon the denial of a petition for writ of certiorari. Whenever application for a writ of certiorari to review a

> decision of any court is denied, the clerk shall enter an order to that effect, and shall forthwith notify the court below and counsel of record. *Such notification will not be withheld pending disposition of a petition for rehearing except by order of the court or of a justice thereof.* [Italicized portion deleted from later version of C.A.R. 54(b)].

C.A.R. 54(b) was amended on March 30, 1972 to delete any reference to a petition for rehearing after denial of a petition for certiorari, and it has not been further amended since that date. Just as the deletion of statutory language by the legislature renders the language inoperative and indicates that the legislature has admitted a different intent, *Grover v. Industrial Comm'n*, 759 P.2d 705, 710 (Colo. 1988), so has the deletion of any reference to a petition for rehearing on a denial of writ of certiorari indicated an intent to disallow such a pleading or procedure. The Colorado Supreme Court simply had no jurisdiction to review the Combined Petition.

That the Colorado Supreme Court had no jurisdiction to review the Combined Petition is made even more evident by the fact that the court did not deny the Combined Petition, but ordered it "stricken." App. A-1. The word "stricken" means eliminated from the record, not merely eliminated with a pen, or crossed out with a typewriter, and left in the record. *Moore v. Moore*, 215 Ga. 47, 108 S.E. 2d 704, 706 (1959). The striking of this pleading leaves the record as if the Combined Petition was never filed. Therefore, the 90-day period for BFI began to run on the date the Colorado Supreme Court denied its petition for writ of certiorari.

BFI confuses the jurisdictional issue by arguing that it seeks a writ to review the Colorado Supreme Court's Order, dated August 28, 1998, striking BFI's Combined Petition for

Rehearing and Motion for Relief. Petition at 1.[1] This argument presents several problems for BFI, not the least of which is Rule 13.1 itself. That Rule provides that the 90-day period runs from the date of entry of the order denying certiorari and not from the date that an improperly filed petition for rehearing is stricken.

More important, however, is the fact that BFI failed to raise any federal question in the lower courts until that time. BFI admits that it first raised a federal question in its stricken Combined Motion for Rehearing and Motion for Relief filed on August 10, 1998. Petition at 2, App. B. Yet all of BFI's arguments regarding deprivation of constitutional rights flow from its allegation that the Colorado Supreme Court's January 13, 1997 opinion violated the Fourteenth Amendment "by converting Respondent's claim for breach of the covenant of good faith and fair dealing from tort to contract." Petition at 23. BFI did not raise these arguments in a petition for rehearing of that opinion, in the proceedings on remand in the Colorado Court of Appeals, or in its petition for writ of certiorari from that court's second opinion in this case.

## STATEMENT OF THE CASE

A chronology of relevant opinions and filings below, with references to the Appendix to BFI's petition, will assist the Court in determining the issues presented.

On July 15, 1993, a jury rendered a verdict in favor of Respondent on both of two claims for relief: 1) breach of progressive disciplinary contract; and 2) breach of express covenant of good faith and fair dealing. App. H-6. On December

---

[1] BFI still could have filed a timely petition for writ of certiorari in this Court after that ruling by the Colorado Supreme Court. Its deadline for filing that petition was October 26, 1998.

12, 1995, the Colorado Court of Appeals affirmed liability on the breach of contract claim, but determined that no tort claim for breach of the express covenant of good faith and fair dealing existed and set aside the entire award. App. L.

On January 13, 1997, the Colorado Supreme Court also affirmed liability on the breach of contract claim and agreed that no tort claim existed. App. H-24, H-27. The court vacated the jury's verdict for punitive damages, holding that punitive damages cannot be awarded on a contract claim. App. H-25. It then reversed the order setting aside economic and noneconomic damages, finding that the jury was properly instructed on the elements of damages for a contract claim, and remanding to the court of appeals to consider BFI's argument that the economic loss award was excessive.[2] App. H-29, 30.

On October 23, 1997, the Colorado Court of Appeals reinstated the economic and noneconomic damages awards, finding them to be supported by the evidence. App. E. On July 27, 1998, the Colorado Supreme Court denied BFI's petition for writ of certiorari. App. C. On August 10, 1998, BFI filed its Combined Petition for Rehearing and Motion for Relief for Denial of Federal and State Constitutional Rights, in which it first raised any federal or constitutional question. App. B. On August 28, 1998, the Combined Petition was stricken by the Colorado Supreme Court. App. A.

The judgment from which BFI actually seeks review is the Colorado Supreme Court opinion of January 13, 1997, which recognized a claim sounding in contract for breach of an express covenant of good faith and fair dealing. App. H. All of BFI's points on certiorari, except its arguments as to amount of economic damages, arose on that date. BFI failed to raise any of its "constitutional" or "federal question" claims until it filed its Combined Petition for Rehearing and Motion for Relief for Denial of Federal and State Constitutional Rights on August 10, 1998. By August, 1998, this case had been remanded from the Colorado Supreme Court back to the Colorado Court of Appeals, and then had been taken up again to the Colorado Supreme Court on another petition for writ of certiorari. BFI never once raised any constitutional or federal question issues in any of the numerous briefs it filed along the way until *after* the denial of writ of certiorari on July 27, 1998.

---

[2] Noneconomic damages are recoverable in Colorado on a breach of contract claim if accompanied by willful and wanton conduct and if the damages are a natural and proximate consequence of such conduct. *Trimble v. City and County of Denver*, 697 P.2d 716, 731 (Colo. 1985).

## REASONS FOR DENYING THE WRIT

With very rare exceptions, this Court will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision which this Court has been asked to review. *Adams v. Robertson*, 520 U.S. 83, 86 (1997). It is undisputed that the Colorado Supreme Court did not address the federal questions presented here. When the highest state court is silent on a federal question, this Court assumes that the issues were not properly presented, and the aggrieved party is required to bear the burden of defeating this assumption. *Ibid.* BFI has not carried its burden of showing that it properly presented any federal questions to the Colorado Supreme Court after its January 13, 1997 opinion recognizing a contract claim for breach of the express covenant of good faith and fair dealing.

BFI argues that "[h]ad the Colorado Supreme Court granted BFI's petition for certiorari on the issue presented, Appendix D-2, no federal constitutional injury, or question thereon, would have arisen in the first instance." Petition at 3. But the problem remains for BFI it never made any constitutional or federal claim arguments until its improperly filed and stricken Combined Petition on August 10, 1998.

The only other issue in the instant writ, the propriety of the economic loss damage awards under the circumstances of this case, arose no later than October 23, 1997, when the Colorado Court of Appeals affirmed those awards. BFI still failed to raise a federal question in its petition for rehearing to that court or in its petition for writ of certiorari with the Colorado Supreme Court. Although BFI had ample opportunity to present these issues to the state courts below, it failed to do so in a timely manner. This Court should not review those issues now.

Even if this Court were to find that the petition herein was timely filed, and even if this Court were to excuse BFI's failure to present any federal question to the state courts below, the opinion of the Colorado Supreme Court at issue is sound, rests on adequate state grounds and does not impinge on any constitutional rights of BFI.

BFI's argument that it was denied procedural due process (*see* Petition at 23) is without merit. The Colorado Supreme Court recognized a contract claim for breach of the express covenant of good faith and fair dealing in its opinion of January 13, 1997. BFI had ample notice and opportunity to be heard on that issue both before the court entered its opinion, through its briefs and oral argument, and after that opinion in a petition for rehearing. It could have presented arguments on that issue on remand or in its petition for writ of certiorari after remand. It failed to do so. BFI's due process arguments are frivolous.

BFI further failed to note anywhere in its petition that both the Colorado Supreme Court and Colorado Court of Appeals affirmed the jury's verdict on Respondent's breach of contract claim based on BFI's progressive disciplinary employment policy. The jury's award of punitive damages was vacated on the basis that punitive damages could not be awarded on contract claims under the circumstances of this case. *See Mortgage Finance, Inc. v. Podleski*, 742 P.2d 900 (Colo. 1987); App. H-24, 25. Therefore, only damages for breach of contract were affirmed, and those damages were supported separately by Respondent's claim for breach of BFI's progressive disciplinary employment policy. App. H-27.

Although BFI did not properly raise a federal constitutional issue in the state courts, those arguments undoubtedly would have been rejected since the damage awards were supported separately by a well established breach of contract claim. *See Continental Air Lines, Inc. v. Keenan*, 731 P.2d 708 (Colo. 1987). When a constitutional question is not essential to the resolution of an issue before the Colorado Supreme Court, that court will not address it. *See Ricci v. Davis*, 627 P.2d 1111 (Colo. 1981). Further, even if somehow the Colorado Supreme Court violated BFI's due process rights by recognizing a contract claim for breach of an express covenant of good faith and fair dealing in this case, this Court's jurisdiction would fail if the non-federal ground is independent of the federal ground and is adequate to support the judgment. *Jankovich v. Indiana Toll Road Comm.*, 379 U.S. 487, 489 (1891).

It is, of course, beyond argument that the Colorado courts are expected to define and further refine the common law through case law pronouncements. The Colorado Supreme Court did so in this case and did so in a manner that did not violate any constitutional rights of BFI, since liability had already been established on the breach of contract claim. The award complained of by BFI would have been affirmed even if the Colorado courts had reversed the jury's verdict based on breach of the express covenant of good faith and fair dealing.

## CONCLUSION

This case does not merit further review by this Court. The petition should be denied.

Respectfully submitted,

STEFAN KAZMIERSKI
Colorado Reg. No. 18234
*Counsel of Record*
ROSEMAN & KAZMIERSKI, LLC
*Attorneys for Respondent*
899 Logan Street
Suite 203
Denver, CO 80203
(303) 839-1771